

THE JURISPRUDENCE OF DEATH: EVOLVING STANDARDS FOR THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

MARGARET JANE RADIN†

TABLE OF CONTENTS

I. INTRODUCTION	990
II. CURRENT TREATMENT OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE	992
A. <i>Typology of Cruel and Unusual Punishments Claims</i>	992
B. <i>The Supreme Court's Approaches to the Cruel and Unusual Punishments Clause</i>	997
III. STANDARDS OF REVIEW	1001
A. <i>Approaches to Standards of Review Under the Cruel and Unusual Punishments Clause</i>	1001
1. Attitudes of Members of the Court	1002
2. Different Standards for Different Cases?	1009
3. The Two-Tier Approach	1013
B. <i>Toward a Theory of Review Under the Clause</i>	1016
1. The Principle of Risk of Error	1017
2. Relevant Factors for Allocating Risk of Error ...	1022
3. Applications of the Risk of Error Principle	1027
IV. THE SUBSTANTIVE STANDARD	1030
A. <i>Fixed and Variable Meaning Alternatives</i>	1030
B. <i>Positive and Normative Approaches to Variable Meaning</i>	1034
1. The Positive Approach	1034
2. The Normative Approach	1039
C. <i>Principles of Cruelty</i>	1042
1. Dignity	1044
2. Excessiveness	1045
3. Are Dignity and Excessiveness Discrete Principles?	1046
D. <i>The Excessiveness Principle and the Justification of Punishment</i>	1047
1. Excessiveness and Least Restrictive Means	1048
2. Utilitarianism, Retributivism, and Mixed Approaches	1049
3. The <i>Coker</i> Two-Pronged Excessiveness Test and Its Implications	1052
E. <i>Positive and Normative Approaches to Proportionality</i>	1057
1. The Positive Approach	1057
2. The Normative Approach	1060
V. CONCLUSION: FURTHER REFLECTIONS ON THE DEATH PENALTY	1062

† Assistant Professor of Law, University of Oregon. A.B. 1963, Stanford University; M.F.A. 1965, Brandeis University; J.D. 1976, University of Southern California. Member, California Bar; Teacher-Member, Oregon Bar.

I. INTRODUCTION

In *Coker v. Georgia*¹ the Supreme Court held that state legislation authorizing execution of rapists violates the cruel and unusual punishments clause of the eighth amendment.² Justice White, writing for himself and Justices Stevens, Blackmun and Stewart, professed an "abiding conviction" that the death penalty for rape is "excessive."³ Justices Brennan and Marshall concurred in the judgment on the basis of their broader abiding conviction that execution is not permissible for any crime.⁴ Justice Powell also concurred in the judgment, although he did not think the death penalty should be constitutionally foreclosed as punishment for all convicted rapists.⁵ Only Chief Justice Burger and Justice Rehnquist dissented.⁶

Coker marks a turning point in eighth amendment jurisprudence. It is the first modern decision in which the Supreme Court has relied on disproportionality to invalidate a punishment under the cruel and unusual punishments clause.⁷ It is also the first death penalty case in which as many as six members of the Court have explicitly relied on substantive analysis of what con-

I thank the following people who read and criticized drafts of this Article and whose thoughts I have gratefully incorporated: C. Edwin Baker, Karl E. Johnson, Michael S. Moore, John A. Seibert, Jr., Roy G. Spece, Jr. They are not responsible for my errors and infelicities. I also thank Edwin I. Caleb for helpful research assistance.

¹ 433 U.S. 584 (1977).

² The cruel and unusual punishments clause of the eighth amendment is applicable to the states through the fourteenth amendment. See *Robinson v. California*, 370 U.S. 660, 666-67 (1962); see note 29 *infra*.

³ 433 U.S. at 598.

⁴ *Id.* 600 (Brennan, J., concurring); *id.* (Marshall, J., concurring).

⁵ *Id.* 601, 604 (Powell, J., concurring in part and dissenting in part).

⁶ *Id.* 604 (Burger, C.J. & Rehnquist, J., dissenting).

⁷ In *Weems v. United States*, 217 U.S. 349, 367 (1910), the Court said that it is an Anglo-American "precept of justice that punishment for crime should be graduated and proportioned to offense." In *Weems* the Court held that to impose an onerous Hispanic punishment called *cadena temporal* for falsifying an official document violated the cruel and unusual punishments clause as reproduced in the Philippine Bill of Rights. *Cadena temporal* consisted of at least twelve years of imprisonment at "hard and painful" labor, in addition to perpetual future surveillance and loss of civil rights. *Id.* 364. Although considerations of proportionality figured in the Court's analysis, so did the concept of unusualness. See note 8 *infra*. The Court noted that this punishment "has no fellow in American legislation," violated the clause in "kind" because it was "unusual in its character," and violated the clause in "degree" because it was "cruel in its excess." *Id.* 377. In the nearly seven decades between *Weems* and *Coker*, *Weems* has often been relied upon to support a role for proportionality or "excessiveness" in eighth amendment analysis. As an example, see Justice Marshall's concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 324-25 (1972). *Coker* is the first Supreme Court case to rely exclusively on the proportionality concept.

stitutes cruel punishment rather than on issues of procedure or the proper extent of judicial review. Most of the recent development of eighth amendment doctrine has occurred in the context of the Supreme Court's struggle with the death penalty. This Article reviews that development in order to draw some general conclusions about the constitutional standards that should apply when a punishment is challenged under the cruel and unusual punishments clause. Two interrelated types of standards, or ways of thinking about standards, shape the analysis: standards of review and substantive standards.

The first half of the Article examines the issues surrounding standards of review, and asserts that an analysis of the risk of error entailed in applying a particular punishment should determine the appropriate standard of review in each case. Risk of error analysis, which takes into account the strength of the interests at stake, dictates that standards of review, or levels of judicial scrutiny, will vary as a function of several factors. The major factors and the principles by which they are or ought to be weighed are considered; those principles lead to the conclusion that "rational basis" deference is wrong in cases challenging the death penalty.

The second half of the Article deals with the substantive question of how to determine what punishments are cruel within the meaning of the eighth amendment.⁸ I argue that the Court is

⁸ This Article does not deal directly with the question of what, if anything, is added or changed by the word "unusual" in the clause. In *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Brennan reviewed the Court's passing references to the "unusual" component of the clause, and concluded: "The question [whether the word 'unusual' has any qualitative meaning distinct from 'cruel'], in any event, is of minor significance; this Court has never attempted to explicate the meaning of the Clause simply by parsing its words." *Id.* 276 n.20. The view that the word refers to "illegal" punishments—those whose severity and effectiveness cannot be gauged and monitored because they are outside the ambit of known and authorized punishments in the Anglo-American legal system—seems most plausible. Cf. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839, 855-59 (1969) (arguing that the cruel and unusual punishments clause of the English Bill of Rights of 1689 was, in part, an objection to unauthorized punishments, although use of the word "unusual" was due to chance or sloppy draftsmanship). Infliction of a punishment of this sort could very well be cruel because arbitrary, and unusualness should thus figure in a complete analysis of cruelty. See *Furman v. Georgia*, 408 U.S. 238, 318 (1972) (Marshall, J., concurring); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 855-57 (1972). The word "unusual" in the clause may mean, therefore, that punishments hitherto unknown to our penal system should be closely scrutinized for elements of cruelty. This role for "unusualness" is suggested by the Court's decisions in *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958) (denationalization) and *Weems v. United States*, 217 U.S. 349, 377 (1910) (*cadena temporal*). This Article incorporates "unusualness" into its general analysis of "cruelty" at text accompanying notes 145-46 *infra*, although its primary focus is on the meaning of the clause with respect to such usual punishments as death and imprisonment.

correct in drawing the clause's substantive meaning "from the evolving standards of decency that mark the progress of a maturing society,"⁹ but incorrect to the extent that it tries to glean the content of those "evolving standards of decency" merely from objective indicia like legislative enactments, referenda or opinion polls. The Court must search for a deeper moral consensus on the meaning of cruelty in order to determine whether a specific punishment comports with current standards of decency. The analysis requires evaluation of shared societal notions about cruelty and, especially in light of the Court's commitment to proportionality revealed in *Coker*, investigation of theories justifying various forms of punishment.

The end result of these inquiries is that, although maintaining the conceptual distinction may be useful, standards of review and substantive standards ultimately coalesce. When no moral consensus is discernible as to the cruelty of a punishment, as I will suggest is true for the death penalty, the Court will not be able to reach a decision on it by a substantive analysis utilizing current standards of decency. Nevertheless, in such a case there is likely to exist a moral consensus dictating how the risk of error ought to be allocated in the face of the moral uncertainty as to the punishment's substantive validity. The allocation of risk of error, like the substantive analysis, depends on normative considerations concerning the dignity governmental institutions must afford individual citizens. The normative considerations that inform the substantive analysis thus also govern the standard of review the Supreme Court should utilize in scrutinizing the constitutionality of legislation imposing a criminal sanction. As background for the development of a theory of review taking both types of standards into account, Part II of this Article sets out a typology of cruel and unusual punishment claims and outlines the Court's recent decisions interpreting the cruel and unusual punishments clause.

II. CURRENT TREATMENT OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

A. *Typology of Cruel and Unusual Punishments Claims*

The cruel and unusual punishments clause has given rise to five basic categories of limitations on criminal punishment.¹⁰ They are:

⁹ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁰ This Article does not address the issue whether the clause limits punishments considered to be outside the criminal process. See *Ingraham v. Wright*, 430 U.S.

Type 1 (Means of Punishment), limiting legislative power to authorize means of punishment. The issue in a Type 1 case takes the form, "Is it constitutional for the government to impose punishment X for *any* crime?" Adjudication involves abstract consideration of the nature of punishment X. The primary exemplar of the Type 1 case is *Trop v. Dulles*,¹¹ in which the Supreme Court found denationalization to be an impermissible punishment for wartime desertion, even though it assumed that punishing deserters with death was permissible. The Type 1 "core case," often mentioned by the Court in dictum,¹² is the clause's limitation on legislative authority to impose physical torture, like the rack, thumbscrew or drawing and quartering, as punishment for crime.

Type 2 (Proportionality), (A) limiting legislative power to authorize a means or amount of punishment for a *particular* crime and (B) limiting judicial power to impose a means or amount of punishment on a specific criminal. The issue in a Type 2(A) case takes the form, "Is it constitutional for the government to impose punishment X on any offender found guilty of crime Y?" The issue in a Type 2(B) case takes the form, "Is it constitutional for the government to impose punishment X on offender N for crime Y, committed in a particular manner and under particular circumstances?" Both cases require a proportionality inquiry, though at different levels of abstraction. Adjudication of Type 2 cases involves consideration of the punishment, the crime and whether the punishment fits the crime. Examples of the Type 2(A) case are *Coker v. Georgia*,¹³ rejecting the death penalty for rape, and, perhaps, *Weems v. United States*,¹⁴ rejecting the Philippine punishment of *cadena temporal* for falsifying an official document. An example of the Type 2(B) case is *People v. Sinclair*,¹⁵ overturning a nine year prison sentence for

651, 664-71 (1977) (cruel and unusual punishments clause not applicable to corporal punishment of public school children).

¹¹ 356 U.S. 86 (1958).

¹² See, e.g., *Weems v. United States*, 217 U.S. 349, 377 (1910) (quartering, hanging in chains, castration); *In re Kemmler*, 136 U.S. 436, 446 (1890) (burning at the stake, crucifixion, breaking on the wheel). See also *State v. Williams*, 77 Mo. 310, 312-13 (1883) (burning at stake, cutting off nose, ears or limbs, forced starvation, boiling to death).

¹³ 433 U.S. 584 (1977).

¹⁴ 217 U.S. 349 (1910). *Weems* also involved the element of unusualness. See notes 7 & 8 *supra*.

¹⁵ 387 Mich. 91, 194 N.W.2d 878 (1972) (per curiam). Two justices in *Sinclair* held that the sentence imposed was "demonstrably and grossly excessive, in the light of the depravity of the criminal . . . and in light of the usual and customary disposition of those convicted of like conduct . . ." *Id.* at 153, 194 N.W.2d at 906 (Brennan & Adams, JJ., concurring).

possession of two marijuana cigarettes.¹⁶

Type 3 (Power to Criminalize), limiting legislative power to make conduct criminal. The issue in a *Type 3* case takes the form, "Is it constitutional for the government to impose any punishment on anyone for defined conduct *Z*?" *Robinson v. California*,¹⁷ the case that exemplifies this category, held that it was unconstitutional to punish persons merely for their "status" as narcotics addicts. In a sense, *Type 3* cases are a subset of cases within *Type 2(A)*—that is, any punishment is disproportionate if the defined offense is deemed not criminalizable.¹⁸

¹⁶The Supreme Court has not yet decided a case using the *Type 2(B)* rationale. Chief Justice Burger, dissenting in *Coker*, argued that it would have been more appropriate to consider the suitability of the death penalty for rape on a case-by-case (*Type 2(B)*) basis. 433 U.S. at 607. Justice Powell adopted a similar stance in his *Furman* dissent, 408 U.S. at 461, but in his concurrence in *Coker* he argued that a narrow *Type 2(A)* limitation should be applied. 433 U.S. at 604.

Earlier opinions construing the cruel and unusual punishments clause assumed that *Type 2(B)* decisions were inappropriate for judicial review. See, e.g., *United States v. Rosenberg*, 195 F.2d 583 (2d Cir.), cert. denied, 344 U.S. 838 (1952). In *Rosenberg*, Judge Jerome Frank authored a unanimous opinion upholding the sentence of execution imposed upon Julius and Ethel Rosenberg for espionage. Writing for himself alone, he went on to evaluate the "sixty years of undeviating federal precedents, [holding] that an appellate court has no power to modify a sentence." *Id.* 604. Addressing the Rosenbergs' claim that their particular death sentences violated the eighth amendment, Judge Frank noted that:

Several courts have ruled that a sentence within the limits of a valid statute cannot amount to "cruel and unusual punishments", that, when a statute provides for such punishment, the statute only can be thus attacked. . . . No federal decision seems to have held cruel and unusual any sentence imposed under a statute which itself was constitutional.

Id. 607 (citations and footnote omitted). Assuming *arguendo* that "a particular sentence, within the literal terms of [a valid] statute [may violate the eighth amendment] because of the specific circumstances of the case," Judge Frank found that "[n]o such circumstances exist in this case." *Id.* 608 (footnote omitted).

¹⁷370 U.S. 660 (1962). In *Robinson* the offense was deemed not criminalizable because the statute in question proscribed a "chronic condition" or "status" rather than voluntary conduct. *Id.* 665-66.

¹⁸Just as *Type 2(A)* subsumes *Type 3* cases adjudicating the state's ability to punish, *Type 2(B)* subsumes *Type 3* cases in which judicial imposition of punishment upon particular offenders may be challenged. Thus, punishment of offender *N* whose conduct is deemed involuntary because of insanity or duress, or more aptly, because *N* engaged in the conduct in a state of automatism, would be disproportionate. This parallel limitation is formalized in the doctrine of criminal responsibility, which limits criminal punishment to persons considered responsible moral agents. See, e.g., H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 28-53 (1968). In light of this analogy it is not surprising that some commentators thought *Robinson* harbored the seed of a constitutional criminal responsibility doctrine. See Cuomo, *Mens Rea and Status Criminality*, 40 S. CAL. L. REV. 463, 474 (1967); Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 127 n.71; Note, *The Cruel and Unusual Punishments Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 646, 648 (1966); see also Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 385-86 (1966). So far this seed has not germinated. The Court has

Type 4 (Nonjudicial Discretion), limiting official discretion to carry out otherwise permissible punishment. In *Type 4* cases the issue usually takes the form, "Is it constitutional for government officials to subject offender *N* to certain specific conditions ancillary to authorized valid punishment?" For example, in *Estelle v. Gamble*,¹⁹ the Supreme Court held that "deliberate indifference to serious medical needs of prisoners" was proscribed by the eighth amendment.²⁰

Type 5 (Procedural Due Process), limiting legislative power to authorize the procedures by which a specific punishment is imposed. The issue in a *Type 5* case takes the form, "Is it constitutional for the government to impose punishment *X* on any offender selected by means of these enacted sentencing procedures?" This type of eighth amendment adjudication surfaced in *Furman v. Georgia*,²¹ in which three justices thought that the death penalty, as administered under statutes allowing death to be imposed at the jury's discretion, violated the clause because of the danger of arbitrary or unfair imposition on individual offenders.²² It has since been the dominant rationale in cases applying the clause to the death penalty for murder.²³

The foregoing categories are not perfectly distinct; *Type 4*, in particular, may overlap with the others. For example, it overlaps with *Type 2(B)* to the extent that judicial execution of a flexible

made it clear that the *Robinson* approach will be sparingly used; indeed, it may be completely *sui generis*. See *Ingraham v. Wright*, 430 U.S. 651, 667 (1977); *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion).

¹⁹ 429 U.S. 97, 104 (1976).

²⁰ The Court found no valid *Type 4* claim in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), in which it held that it was not unconstitutional for Louisiana authorities to try again after their first attempt to electrocute the petitioner miscarried. The core cases within this category, however, challenge deplorable prison conditions and inadequate prison health care. *E.g.*, *Holt v. Sarver*, 309 F. Supp. 362, 372-73 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). See Robbins and Buser, *Primitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893 (1977).

²¹ 408 U.S. 238 (1972).

²² *Id.* 240-57 (Douglas, J., concurring); *id.* 306-10 (Stewart, J., concurring); *id.* 310-14 (White, J., concurring). See text accompanying notes 31-35 *infra*.

²³ See text accompanying notes 31-47 *infra*. It could be argued that this due process rationale was adopted in the *Furman* concurrences because a straightforward due process attack on the constitutionality of imposing death under statutes allowing complete jury discretion had only recently been rejected in *McGautha v. California*, 402 U.S. 183 (1971). See note 31 *infra*.

legislative mandate (indeterminate sentencing) is viewed as involving the same kind of official discretion as the more typically non-judicial discretion involved in parole decisions. Type 4 also overlaps with Type 1 to the extent that a proscribed sanction such as beatings by prison guards is considered unconstitutional because both beyond the legislative power to authorize and beyond official discretion to impose.

The Supreme Court has so far delineated only three categories of eighth amendment claims. At times it has combined Types 1 and 4 (limiting means of punishment and nonjudicial discretion) into one category;²⁴ it has not recognized the procedural category (Type 5) as a separate type of limitation. It is desirable to distinguish between Type 1 and Type 4 because the standard of review (or level of scrutiny) the Court adopts will vary depending upon whether it is reviewing a legislative enactment authorizing punishment, the sentence imposed by a court or the conduct of an official administering authorized punishment. It is desirable to distinguish Type 5 to facilitate consideration of whether procedural reasoning is appropriate in eighth amendment cases. It seems clear that Types 1 and 2 include the core cruel and unusual punishments cases, while the limitations of Types 3, 4 and 5 overlap the due process clause. The typology facilitates analyses of both these hybrid claims and the core cases, maintaining the distinctions between them. It also emphasizes the individual and governmental interests at issue in a particular case, and thereby enables a reviewing court to make a reasoned, explicit decision concerning the standard of review to be applied.

This Article's principal purpose is to develop a theory of judicial review of legislative enactments for claims falling within the core categories of Type 1 and Type 2(A). The Supreme Court has recently decided cases within these categories when it faced the questions whether a state legislature may authorize death as punishment for any crime,²⁵ and if so, whether death may be authorized as punishment for the crime of rape.²⁶

²⁴ See *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (juxtaposing *Trop v. Dulles*, 356 U.S. 86 (1958), and *Estelle v. Gamble*, 429 U.S. 97 (1976), as authority for the proposition that the cruel and unusual punishments clause limits the kinds of punishments that may be imposed on those convicted of crimes).

²⁵ See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

²⁶ *Coker v. Georgia*, 433 U.S. 584 (1977).

B. *The Supreme Court's Approaches to the Cruel and Unusual Punishments Clause*

The origin of the clause and the history of eighth amendment adjudication need not be reviewed here.²⁷ It is significant, however, that those who have set out to recount the clause's judicial history can discuss in a very few pages *every* Supreme Court case dealing with the clause. Eighth amendment claims were rare during the Court's first 175 years—the clause was discussed in only nine cases prior to its incorporation into the due process clause of the fourteenth amendment in 1962.²⁸ Doubtless part of the reason for the clause's dormancy is that the Court only recently became fully committed to the proposition that the clause limits state legislatures as well as Congress.²⁹ The long quiescence of the clause may also be a function of its Delphic quality—it is easier to tell what circumstances draw into play other clauses of the Bill of Rights dealing with criminal justice, for example, double jeopardy or self-incrimination, than the prohibition of *cruel and unusual* punishments, where the operative terms are vague and ambiguous. Moreover, as long as the Court took for granted that the clause extended only to punishments that the Framers thought cruel in 1789,³⁰ there was little need to invoke it; for there was little danger that an American legislature would authorize the rack, the wheel, or drawing and quartering as criminal punishments.

²⁷ In his concurring opinion in *Furman*, Justice Marshall reviewed the origin of the clause in the English Bill of Rights of 1689, the circumstances surrounding its inclusion in our Bill of Rights in 1789, and its case history in the Supreme Court. 408 U.S. at 316-28 (Marshall, J., concurring). See also Granucci, *supra* note 8; Note, *Aversion Therapy: Punishment as Treatment and Treatment as Cruel and Unusual Punishment*, 49 S. CAL. L. REV. 880, 928 n.238 (1976).

²⁸ Incorporation was effected in *Robinson v. California*, 370 U.S. 660 (1962). See notes 2 *supra* & 29 *infra*. Pre-*Robinson* cases that discussed the clause include: *Trop v. Dulles*, 356 U.S. 86 (1958); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Badders v. United States*, 240 U.S. 391 (1916); *Weems v. United States*, 217 U.S. 349 (1910); *Howard v. Fleming*, 191 U.S. 126 (1903); *O'Neil v. Vermont*, 144 U.S. 323, 339-41, 370-71 (1892) (Field, J. & Harlan & Brewer, JJ., dissenting); *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878); and *Pervear v. Commonwealth*, 72 U.S. (5 Wall.) 475 (1867).

²⁹ As early as 1947 it appeared that some members of the Court were tacitly assuming that the fourteenth amendment due process clause "incorporated" the cruel and unusual punishments clause and made it applicable to the states. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion) ("the Fourteenth would prohibit by its due process clause execution by a state in a cruel manner"). The tacit "incorporation" effected by *Robinson v. California*, 370 U.S. 660 (1962), has been verified in later opinions. See *Furman v. Georgia*, 408 U.S. 238, 328 n.34 (1972) (Marshall, J., concurring); *Malloy v. Hogan*, 378 U.S. 1, 6 n.6 (1964); *Gideon v. Wainwright*, 372 U.S. 335, 341-42 & n.7 (1963).

³⁰ This historical view of the clause's substantive meaning will be discussed at text accompanying notes 161-66 *infra*.

The Court had scanty institutional history to guide it, then, and no well-worn grooves of eighth amendment jurisprudence through which to channel its thinking, when, in 1972, it was faced with the quintessential hard case—the death penalty.³¹ The resulting decision, *Furman v. Georgia*,³² was a jurisprudential debacle.³³ The Court issued a per curiam reversal of the judgments below insofar as they left “undisturbed the death sentence imposed,”³⁴ followed by nine separate opinions resting on three categories of rationale. Justices Douglas, Stewart and White put aside the question whether it was ever constitutional to execute anyone (the Type I inquiry), and decided only that it was unconstitutional to execute anyone under current procedures, which they found to be arbitrary and/or discriminatory (inaugurating Type 5).³⁵ Although their reasoning did not articulate how the purposes of the cruel and unusual punishments clause differ from those of the due process and equal protection clauses, at least their approach required little judicial innovation regarding the clause’s substantive meaning. Four dissenters would have found that the petitioners could constitutionally be executed, but they, by and large, skirted the substantive issue by means of another route. Justices Powell, Burger, Blackmun and Rehnquist, perhaps also influenced by the issue’s recent presentation in the context of the due process clause,³⁶ said that principles of judicial restraint and deference to state legislative judgments did not permit them to inquire very deeply into the

³¹ Challenges to the death penalty shifted to the eighth amendment after attempts based on traditional due process doctrine proved unsuccessful in *McGautha v. California*, 402 U.S. 183 (1971). The *McGautha* Court held that where death is an authorized punishment, submission of the punishment issue to the jury without specific standards to guide its discretion does not deprive a criminal defendant of due process of law. *Id.* 196.

³² 408 U.S. 238 (1972).

³³ Justice Rehnquist has referred to the Court’s expression of its concerns in *Furman* as “glossolalia.” *Woodson v. North Carolina*, 428 U.S. 280, 317 (1976) (Rehnquist, J., dissenting). In *Rockwell v. Superior Court of Ventura County*, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976), Judge Clark noted that in the four years between *Furman* and *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion cases, “all was confusion” as states attempted to enact constitutional death penalty statutes. 18 Cal. 3d at 436, 556 P.2d at 1116-17, 134 Cal. Rptr. at 666 (Clark, J., concurring). He added that “[w]here it not literally a matter of life or death, the entire affair would assume the character of a comedy of errors. . . .” *Id.* at 437, 556 P.2d at 1118, 134 Cal. Rptr. at 667. For an analysis of the nine opinions in *Furman* and the resultant uncertainties, see Polsby, *The Death of Capital Punishment?* *Furman v. Georgia*, 1972 Sup. Ct. Rev. 1.

³⁴ 408 U.S. at 240.

³⁵ *Id.* 240-57 (Douglas, J., concurring); *id.* 306-10 (Stewart, J., concurring); *id.* 310-14 (White, J., concurring).

³⁶ See note 31 *supra*.

matter.³⁷ Only Justices Brennan and Marshall inquired into the clause's substantive meaning, and they concluded that the eighth amendment precluded execution as a permissible means of punishment under any circumstances.³⁸ Though the rationale of legislative deference attracted the most adherents in *Furman* the alliance of the three Justices who focused on procedure with the two who relied on the clause's substantive meaning resulted in reversal and an uneasy constitutional limbo for the death penalty during the next four years.

*Gregg v. Georgia*³⁹ and its companion cases, the Court's second go-round with the death penalty, elaborated the procedural rationale. Justices Brennan and Marshall remained the only two who focused primarily on the substantive meaning of the clause; the thrust of the holdings in *Gregg* and its companions is procedural. The Justices of the plurality (Stewart, Powell and Stevens) held that imposition of the death penalty for murder may be neither mandatory nor left to standardless discretion, but rather must be subject to guided discretion vested in the sentencing authority. Mandatory-type statutes were struck down in *Woodson v. North Carolina*⁴⁰ and *Roberts v. Louisiana*⁴¹ (with the aid of concurrences in both decisions by Justices Brennan and Marshall⁴²). Guided discretion-type statutes were upheld in *Gregg*,⁴³ *Jurek v. Texas*,⁴⁴ and *Proffitt v. Florida*⁴⁵ (with the aid of concurrences from the four justices who would have upheld the death penalty in all of the cases⁴⁶).

The plurality's discussion in *Gregg* focused on what forms of discretion and checks on discretion in imposing the death penalty are constitutionally required. Their central holding was that legis-

³⁷ 408 U.S. at 383-84 (Burger, C.J., Blackmun, Powell & Rehnquist, JJ., dissenting). See *id.* 410 (Blackmun, J., dissenting); *id.* 431-33 (Powell, J., dissenting); *id.* 467-70 (Rehnquist, J., dissenting).

³⁸ *Id.* 257-306 (Brennan, J., concurring); *id.* 314-74 (Marshall, J., concurring).

³⁹ 428 U.S. 153 (1976).

⁴⁰ 428 U.S. 280 (1976).

⁴¹ 428 U.S. 325 (1976).

⁴² 428 U.S. at 305 (Brennan, J., concurring); *id.* 306 (Marshall, J., concurring); *id.* 336 (Brennan, J., concurring); *id.* (Marshall, J., concurring).

⁴³ 428 U.S. at 196-207 (plurality opinion).

⁴⁴ 428 U.S. 262, 276 (1976) (plurality opinion).

⁴⁵ 428 U.S. 242, 259-60 (1976) (plurality opinion).

⁴⁶ 428 U.S. at 277 (White, J., Burger, C.J. & Rehnquist, J., concurring); *id.* 279 (Blackmun, J., concurring); *id.* 260 (White, J., Burger, C.J. & Rehnquist, J., concurring); *id.* 261 (Blackmun, J., concurring).

lation authorizing execution for murder is consistent with the eighth amendment if the sentencer is required to consider the individual offender and the offense, weighing specified aggravating circumstances against mitigating factors which may also (but need not) be specified.⁴⁷

In *Coker* Justice White shifted the focus to the Type 2(A) (proportionality) category of limitation on punishment, in which the issue is whether the punishment enacted by the legislature exceeds the constitutional limit for a particular crime. The four members of the *Coker* plurality (Justices White, Stewart, Blackmun and Stevens) relied neither on Type 5 procedural limitations nor on a Type 1 (means of punishment) inquiry into the per se constitutionality of the death penalty.⁴⁸ Instead, the plurality found death to be disproportionate to the crime of rape and, therefore, unconstitutionally cruel.⁴⁹ The explicit recognition of the concept of proportionality in a sense marks the coming of age of eighth amendment jurisprudence, with far-reaching consequences for the future elaboration of the clause's meaning. In elaborating that meaning, a more reasoned approach to standard of review is sorely needed. The analytical problems with the approaches hitherto taken by the Court are reflected in the widely fluctuating adjudicatory attitudes of the individual Justices during the past five terms. In Part III those varying attitudes are analyzed, and an attempt is made to fashion a theory of review that can provide more consistent and rational adjudication of eighth amendment issues.

⁴⁷ See, e.g., *id.* 188-95 (plurality opinion). For an excellent discussion of these five cases and constitutional problems inherent in their approach, see *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 63-76 (1976).

⁴⁸ Between *Gregg* and *Coker* the Court decided a number of cases challenging death sentences, but the opinions either relied on *Gregg* or on a variety of procedural and non-eighth amendment grounds. See *Dobbert v. Florida*, 432 U.S. 282 (1977) (imposition of death sentence under statute approved in *Proffitt* on offender who committed murder while Florida had no constitutional death penalty violated neither equal protection nor prohibition against ex post facto laws); *Roberts v. Louisiana*, 431 U.S. 633 (1977) (per curiam) (reversed mandatory death sentence for murder of policeman as inconsistent with *Gregg* rationale); *Gardner v. Florida*, 430 U.S. 349 (1977) (reversed death penalty imposed by trial judge who based his sentence on report defendant had no opportunity to deny or explain as inconsistent with due process); *Gilmore v. Utah*, 429 U.S. 1012 (1976) (execution allowed to proceed because defendant had made a knowing and intelligent waiver of all federal rights); *Davis v. Georgia*, 429 U.S. 122 (1976) (death sentence reversed because prospective juror who expressed scruples, but not an irrevocable commitment, against its imposition was excluded at voir dire).

⁴⁹ *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Justice Powell concurred in the judgment, but stated that he thought a narrower inquiry should have been undertaken by the Court, and that the constitutionality of the death penalty for particularly brutal rapes should not have been foreclosed. *Id.* 601 (Powell, J., concurring). See text accompanying notes 95-96 *infra*.

III. STANDARDS OF REVIEW

A. *Approaches to Standards of Review Under the Cruel and Unusual Punishments Clause*

Standards of adjudication determine the quantum of proof of facts required to decide a case, and assign to one party or the other the burden of establishing the requisite degree of certainty. They also determine the relevance and weight of particular kinds of evidence and the permissibility and weight of particular kinds of legal arguments. A "standard of review," whether said to be applicable to review of a lower court decision or of a legislative decision, reflects all of these factors. Because degrees of certainty, types of evidence, and varieties of argument vary through a range, the possible standards of review that are theoretically open to a reviewing court also vary through a range. Legal precedent or analysis of the competing interests at stake, however, may limit a court's choice of adjudicatory attitude, whether or not that choice is articulated. If one envisions the range of possible adjudicatory attitudes as a continuum or spectrum,⁵⁰ "judicial legislation" or extreme judicial activism occupies one pole and "judicial abdication

⁵⁰ The spectrum analogy was used by Justice Marshall to describe the range of standards of judicial review in cases invoking the equal protection clause. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 70-133 (1973) (Marshall, J., dissenting). In *Rodriguez* Marshall wrote:

The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

Id. 98-99.

This article adopts the word "spectrum" for the notion of variable standards of review, though perhaps the word "continuum" is more precise. For thoughtful observations concerning the "continuum" of adjudicatory attitudes in the theory and practice of constitutional adjudication see Spece, *The Least Restrictive Alternative As An Independent, Preferred Constitutional Standard of Review and Justifying Invigorated Scrutiny: Civil Commitment As A Case Study*, 19 ARIZ. L. REV. — (forthcoming 1978). More traditional commentators still speak of the two-tiered equal protection analysis that Justice Marshall thought inadequate to describe the Court's practice, although there is a recent tendency to perceive a "middle tier" that is less rigorous than "strict scrutiny" but more demanding than "mere rationality." See, e.g., Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689 (1977); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

of responsibility" or extreme deference occupies the other. In terms of the stylized postures or "tiers" often said to be applicable in equal protection and substantive due process analysis, possible adjudicatory attitudes range from the "mere rationality" test to the "compelling state interest" test.⁵¹ In cruel and unusual punishment cases confusion about the appropriate adjudicatory attitude has prevailed, and in the cases challenging the constitutionality of the death penalty a surprising observation can be made. Not only have certain Justices adopted different adjudicatory attitudes from one case to the next without appearing to notice it, but the attitudes expressed or implied in the various opinions have often been so disparate as to range from one end of the spectrum to the other, from the rhetoric of extreme activism to that of extreme deference.

1. Attitudes of Members of the Court

Justice White twice changed colors within the spectrum of judicial review during the course of ruling on cruel and unusual punishments claims from 1972 to 1977. He adopted a rather activist stance in *Furman*, according discretionary death sentence legislation less deference than he had earlier in *McGautha v. California*.⁵² He stated that "past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury,"⁵³ and concluded that the manner of implementing legislative policy presented in *Furman* violated the eighth amendment.⁵⁴ Justice

⁵¹ The strictest form of scrutiny typically involves shifting the burden of persuasion to the state to show that its action is justified, with the further proviso that the state's action cannot be justified no matter how important and legitimate its goals, if measures less restrictive of protected individual interests would serve as well. It is probably misleading to speak of this concatenation as one "standard of review." Burden of persuasion is a concept analytically distinct from scrutiny of goals and means, and is related more closely to the decision of where the risk of error ought to be placed. See text accompanying notes 121-30 *infra*. Furthermore, the less restrictive alternative concept is analytically distinct from the concept of scrutiny of goals, since it involves the selection of permissible means. It is possible to articulate substantive concerns that demand the use of the least restrictive alternative and yet would place the burden of persuasion on the plaintiff to prove that the state's chosen means are not the least restrictive. See Spece, *supra* note 50. "Means" and "goals" coalesce when the goal is non-cruel punishment and cruelty is defined as excessiveness. See note 99 *infra*.

⁵² In *McGautha v. California*, 402 U.S. 183 (1971), Justice White joined in the majority's opinion upholding an arrangement whereby juries were granted unguided discretion to sentence convicted murderers to death. *Furman* was a challenge to three death sentences imposed at the discretion of a jury—one defendant had been convicted of murder and two had been convicted of rape. 408 U.S. at 240.

⁵³ 408 U.S. at 314 (White, J., concurring).

⁵⁴ *Id.*

White based his conclusion on his personal knowledge, derived from years of experience, that the death sentence was so infrequently imposed under the types of statutes before the Court that its imposition on any particular individual was arbitrary and of such insignificant social value as to constitute cruel and unusual punishment.⁵⁵ He did not require the petitioners to prove that this infrequency of imposition meant that the penalty had lost its social value and was now being arbitrarily imposed, although the states contended that its use was being reserved by juries for only the most heinous crimes. He, likewise, did not require petitioners to prove that the statutes had been applied arbitrarily in their particular cases.

Justice White's adjudicatory attitude shifted appreciably toward deference when, in *Gregg* and its companion cases, he reviewed the mandatory and guided discretion statutes authorizing execution for murder. Justice White, with Chief Justice Burger and Justices Rehnquist and Blackmun, favored upholding all the challenged murder statutes. As to the doubtful deterrent efficacy of the death penalty, he wrote, dissenting in *Roberts v. Louisiana*,⁵⁶ that "it would be neither a proper or wise exercise of the power of judicial review to refuse to accept the reasonable conclusions of Congress and 35 state legislatures that there are indeed certain circumstances in which the death penalty is the more efficacious deterrent of crime."⁵⁷ Evidently, Justice White felt that the sentencing schemes did not create the problem of infrequent imposition leading to arbitrariness which he had identified in *Furman*, because he stated in *Gregg*: "I decline to interfere with the manner in which Georgia has chosen to enforce [laws against murder] on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner."⁵⁸

Justice White returned to a more activist adjudicatory attitude in *Coker*, embracing the principle that it is the Court's constitutional function to be the ultimate arbiter on the cruelty of a punishment.⁵⁹ He used no rhetoric of rational basis deference; he did

⁵⁵ *Id.* 312-13.

⁵⁶ 428 U.S. 325 (1976).

⁵⁷ *Id.* 355 (White, J., dissenting). Justice White deemed the legislative conclusions "reasonable" despite his acceptance of the fact that the only reasonable conclusion was that the evidence was inconclusive. See *id.* 354-55.

⁵⁸ *Gregg v. Georgia*, 428 U.S. 153, 226 (1976) (White, J., concurring).

⁵⁹ Writing for the *Coker* plurality, Justice White stated: "The Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment,"

not inquire whether the state legislature had acted in a "clearly irrational" manner in specifying death as a punishment for rape. This was one of Chief Justice Burger's objections to the *Coker* plurality opinion.⁶⁰ The Chief Justice argued in dissent that it was "not irrational—nor constitutionally impermissible—for a legislature to make the penalty more severe than the criminal act it punishes in the hope it would deter wrongdoing."⁶¹ For that reason, the Chief Justice argued, the Court's judgment that the punishment was disproportionate to the crime was irrelevant and an improper exercise of judicial review.⁶²

The Chief Justice and Justice Rehnquist have consistently adopted such a deferential adjudicatory attitude. Dissenting in *Furman*, the Chief Justice wrote that legislative enactments must be presumed to conform to required standards of decency, and that this presumption "can only be negated by unambiguous and compelling evidence of legislative default."⁶³ In his own *Furman* dissent Justice Rehnquist argued that whereas legislative overreaching might sacrifice individual rights protected by the Constitution, "judicial over-reaching" might "result in sacrifice of the equally important right of the people to govern themselves."⁶⁴ He implied that the Court should always err on the side of deference because "[t]he error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious"⁶⁵ than the error involved in mistakenly upholding an unconstitutional law. This, he said, is because the latter type of error "while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by

but "legislative rejection of capital punishment for rape in jurisdictions other than the one whose statute was before the Court strongly confirms our own judgment" that the death penalty for rape is disproportionate. 433 U.S. at 597 (plurality opinion).

⁶⁰ *Id.* 619 (Burger, C.J. & Rehnquist, J., dissenting).

⁶¹ *Id.*

⁶² *Id.* 620-22.

⁶³ 408 U.S. at 384 (Burger, C.J., Blackmun, Powell & Rehnquist, JJ., dissenting). The Chief Justice also rejected the propriety of shifting the burden of proof to the states under a compelling governmental interest/least restrictive means test:

[T]o shift the burden to the States is to provide an illusory solution to an enormously complex problem. If it were proper to put the States to the test of demonstrating the deterrent value of capital punishment, we could just as well ask them to prove the need for life imprisonment or any other punishment.

Id. 396.

⁶⁴ *Id.* 470 (Rehnquist, J., dissenting).

⁶⁵ *Id.* 468.

simply letting stand a duly enacted law of a democratically chosen legislative body.”⁶⁶

Justices Brennan and Marshall have consistently adopted an activist eighth amendment adjudicatory attitude,⁶⁷ although Brennan's is the more activist of the two. Brennan espouses a compelling state interest/least restrictive means test, although he does not so label it.⁶⁸ On two issues in *Furman*, Brennan imposed the burden of proof on the states: first, to show that the discretionary death statutes had not been enforced arbitrarily;⁶⁹ second, to prove that a valid penal purpose required imposition of the death penalty as opposed to a less severe sanction. Considering the latter issue, Brennan began with the guiding principle “that a punishment must not be degrading to human dignity”⁷⁰ and concluded that the dignity principle dictates that “an unusually severe and degrading method of punishment may not be excessive in view of the purposes for which it is inflicted.”⁷¹ These principles compelled Justice Brennan to apply least restrictive means analysis: if “society has indicated it does not regard [an unusually severe punishment as] acceptable,” and the state cannot prove that the punishment serves “any penal purpose more effectively than a significantly less drastic

⁶⁶ *Id.*

⁶⁷ Justice Douglas also adopted an activist adjudicatory attitude in *Furman*. He found the theme of equal protection to be implicit in the eighth amendment, and suggested that it imposed a duty on the judiciary “to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.” *Id.* 256-57 (Douglas, J., concurring). Justice Douglas did not place any burden on petitioners to prove arbitrary or irrational operation of the discretionary statutes, holding them “unconstitutional in their operation” because they were “pregnant with discrimination.” *Id.*

⁶⁸ Justice Brennan's stance in *Furman* implied the view that the “right to be free of cruel and unusual punishment” is like the right to freedom of expression, requiring the strictest judicial scrutiny when threatened by legislation. See *id.* 268-69 (Brennan, J., concurring). He stated that “[j]udicial enforcement of the Clause . . . cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes” and that the Court “must not, in the guise of ‘judicial restraint,’ abdicate [its] fundamental responsibility to enforce the Bill of Rights.” *Id.* 269. In his *Gregg* dissent Brennan argued that the Court “inescapably has the duty” to decide the moral issue posed by the death sentence, 428 U.S. at 229 (Brennan, J., dissenting) and that he would rule against capital punishment on that ground alone. *Id.* 230-31.

⁶⁹ Justice Brennan argued that selective application of the death penalty creates an inference of unfairness that the states must rebut: “When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.” 408 U.S. at 293 (Brennan, J., concurring).

⁷⁰ *Id.* 281.

⁷¹ *Id.* 300. Justice Brennan argued that a punishment was “excessive” if it “serves no penal purpose more effectively than a less severe punishment.” *Id.* 280.

punishment," then that punishment is "cruel and unusual."⁷² Because the evidence supporting the proposition that execution deters more effectively than imprisonment was inconclusive,⁷³ Brennan concluded that the "punishment of death is . . . 'cruel and unusual'" and could no longer be constitutionally imposed for crime.⁷⁴

In contrast to Justice Brennan, Justice Marshall has not used the activist rhetoric which includes shifting the burden of proof or persuasion to the government. Justice Marshall argued in *Furman* that the "entire thrust of the Eighth Amendment is . . . against 'that which is excessive'."⁷⁵ This principle led him to "examine whether less severe penalties" could achieve the state's penological goals.⁷⁶ Accepting that deterrence is a proper penal aim, he assumed that the burden of proof on the issue of whether death deters better than life imprisonment was on petitioners, not on the state. But he thought they had met it;⁷⁷ that is, he thought there was evidence to establish that death is *not* a superior deterrent. Engaging in some scrutiny of state goals, Justice Marshall met the argument that the death penalty might be non-excessive because it provides extra retribution by declaring that retribution for its own sake is not a permissible penological goal.⁷⁸ Marshall made clear in his *Gregg* dissent that he thinks a utilitarian form of retributivism (to prevent people from taking the law into their own hands) might be a legitimate penological goal;⁷⁹ but he has assumed the death penalty is not necessary to achieve this goal, and in neither *Furman* nor *Gregg* did he place any burden on petitioners to show that execution is "too" retributive. Marshall grounded his ultimate finding that the death penalty was unconstitutionally cruel in the

⁷² *Id.* 286.

⁷³ *See id.* 301-02.

⁷⁴ *Id.* 305.

⁷⁵ *Id.* 332 (Marshall, J., concurring).

⁷⁶ *Id.* 342.

⁷⁷ *Id.* 353, 359. He reaffirmed his conclusion regarding the deterrence issue in *Gregg* after examining additional evidence. *See* 428 U.S. at 233-37 (Marshall, J., dissenting).

⁷⁸ Justice Marshall concluded that retribution "is a goal that the legislature cannot constitutionally pursue as its sole justification for capital punishment" 408 U.S. at 363 (Marshall, J., concurring).

⁷⁹ In his *Gregg* dissent, Marshall implied that punishments which serve retributive purposes in order to preclude private citizens from "taking the law into their own hands" were not cruel per se because they serve a utilitarian function. 428 U.S. at 238-39 (Marshall, J., dissenting). *See* text accompanying notes 250-53 *infra*.

rhetoric of judicial deference: "There is no rational basis for concluding capital punishment is not excessive."⁸⁰

Justice Stewart, in *Furman*, adopted an activist adjudicatory attitude similar to Justice White's. He concluded that discretionary statutes permitted the death penalty to be arbitrarily ("wantonly" and "freakishly") imposed.⁸¹ He, too, required no proof that the statutes operated capriciously; it was enough that they had that potential. Then, in upholding the guided discretion death penalty statute in *Gregg*, Justice Stewart shifted his adjudicatory attitude to the opposite end of the spectrum. His rhetoric invoked the presumption of constitutional validity and the "heavy burden" which rested on "those who would attack the judgment of the representatives of the people."⁸² He concluded that the petitioners had not adduced evidence to show the Georgia legislature "clearly wrong," and that absent such evidence the statute must be upheld.⁸³

Meanwhile, in *Woodson v. North Carolina*,⁸⁴ a companion case to *Gregg*, Justice Stewart found that a mandatory death penalty statute for murder was unconstitutional. In doing so he assumed that the legislature had misread *Furman* in attempting to enact a constitutional death penalty statute.⁸⁵ He also concluded—by assuming that jury nullification would occur—that the statute would not alleviate the arbitrariness that caused the discretionary statutes to fail in *Furman*.⁸⁶ Furthermore, because execution is final and ir-

⁸⁰ Yet Justice Marshall stated that "[t]he point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution." 408 U.S. at 359 (Marshall, J., concurring). He also implied in a footnote that the type of strict scrutiny used in substantive due process analysis was appropriate to the eighth amendment challenge to the death penalty because "capital punishment deprives an individual of a fundamental right (i.e., the right to life)" and, therefore, "the State needs a compelling interest to justify it." *Id.* 359 n.141. Marshall thought that the purpose of the cruel and unusual punishments clause could be reformulated as a substantive due process limitation ("punishment may not be more severe than is necessary to serve the legitimate ends of the state"). *Id.*

⁸¹ *Id.* 310 (Stewart, J., concurring).

⁸² 428 U.S. at 175 (plurality opinion).

⁸³ *Id.* 186-87. Justice Stewart made it clear that he thought compelling governmental interest/least restrictive means scrutiny was inappropriate to this case, stating that the Court "may not require the legislature to select the least severe penalty possible." *Id.* 175. Quoting Justice Powell's dissent in *Furman*, he said the Court may not "invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology," although "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." *Id.* 182-83 (quoting 408 U.S. at 451 (Powell, J., dissenting)).

⁸⁴ 428 U.S. 280 (1976) (plurality opinion).

⁸⁵ See *id.* 298-301.

⁸⁶ *Id.* 302-03.

revocable, he concluded that sentencing procedures "must take into account the individual defendant's character and circumstances."⁸⁷ Though the question whether to authorize or require consideration of such factors is usually a "policy" judgment for the legislature to make, Justice Stewart held that their consideration is constitutionally compelled in capital cases.⁸⁸ Thus, Stewart seemed to utilize the rhetoric of deference only when he thought the challenged statutes should be upheld; when faced with the mandatory sentence statutes in *Woodson*, he tacitly departed from the posture of strict deference that he expressly adopted in *Gregg*.⁸⁹ In *Coker*, Stewart joined in White's moderately activist opinion.⁹⁰

Justice Powell, dissenting in *Furman*, stated that the tests under the due process clause and the eighth amendment were fundamentally identical,⁹¹ and that a "heavy burden" would rest on those challenging the statutes "to prove the lack of rational justifications."⁹² He added that least restrictive means analysis was inappropriate to review of legislatively enacted criminal penalties.⁹³ In *Gregg* and its companion cases, Justice Powell joined in both Stewart opinions discussed above, taking part in the Stewart-Powell-Stevens plurality that approved the guided discretion statutes but struck down the mandatory ones, and that exhibited an unexplained shift in adjudicatory attitude.⁹⁴ In *Coker*, Justice Powell voted with the White plurality, but dissented insofar as the plurality opinion was "so sweeping as to foreclose each of the 50 state legislatures from creating a narrowly defined substantive crime of aggravated rape

⁸⁷ *Id.* 304-05.

⁸⁸ *Id.* 304.

⁸⁹ This departure prompted the pointed criticism by Justice White quoted *infra*, note 102.

⁹⁰ See text accompanying notes 59-60 *supra*.

⁹¹ 408 U.S. at 422 n.4 (Powell, J., dissenting).

⁹² *Id.* 451. Justice Frankfurter was among the authorities Justice Powell relied upon in his *Furman* dissent. *Id.* 423-24. He cited the use of the due process standard in Louisiana *ex rel. Francis v. Resweber*, 329 U.S. 459, 470 (1947) (Frankfurter, J., concurring), where Frankfurter argued that the cruel and unusual punishments clause ought not be treated as binding upon the states. 408 U.S. at 423-24. Powell stated that the due process rational basis standard was also applied by the Court in *Trop v. Dulles*, 356 U.S. 86 (1958), in which an act of Congress was invalidated, 408 U.S. at 429, 451, although in *Trop* the Court had said "special diligence" in judicial scrutiny was appropriate where a "fundamental right" was at stake. 356 U.S. at 103 (plurality opinion).

⁹³ 408 U.S. at 451. See note 83 *supra*.

⁹⁴ Justice Powell wrote the plurality opinion in *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding a guided discretion statute with non-jury sentencing). He made no explicit statement in *Proffitt* about his adjudicatory attitude.

punishable by death.”⁹⁵ He abandoned the deference rhetoric of his *Furman* dissent; in fact, he specifically embraced the plurality’s statement that the decision rested ultimately on the Court’s “own judgment.”⁹⁶

Justice Stevens also joined Justice White’s moderately activist opinion in *Coker*. Previously, he had joined the two inconsistent Stewart plurality opinions in *Gregg* and *Woodson*.⁹⁷ Justice Blackmun joined the plurality opinion in *Coker* as well, although previously he had found all challenged death penalty statutes to be constitutional and his adjudicatory attitude had appeared to be deferential.⁹⁸

2. Different Standards for Different Cases?

Cases involving the cruel and unusual punishments clause present two kinds of issues. The first concerns the scope of legis-

⁹⁵ 433 U.S. at 602 (Powell, J., concurring in part and dissenting in part).

⁹⁶ *Id.* 603 n.2. Powell’s position in *Coker* was viewed by Chief Justice Burger and Justice Rehnquist as a “disquieting shift” from his earlier position. *Id.* 607 n.2 (Burger, C.J. & Rehnquist, J., dissenting).

⁹⁷ See text accompanying notes 82-89 *supra*. Justice Stevens announced the judgment of the Court in *Jurek v. Texas*, 428 U.S. 262 (1976) (a companion case to *Gregg*), sustaining a statute that authorized execution for murder whenever the jury found beyond a reasonable doubt that the murder was committed deliberately, and that “there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” *Id.* 267-68. For a trenchant critique of this decision see Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, 6 CAP. U.L. REV. 156 (1976); see also *The Supreme Court, 1975 Term, supra* note 47, at 70-72. The *Jurek* decision raises in acute form the issue whether prediction of future dangerousness is an appropriate basis for punishment. For a discussion of the constitutional aspects of this issue, see Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356 (1975).

In *Jurek*, Justice Stevens did not discuss what standard of review he thought appropriate to decide cases under the cruel and unusual punishments clause. His approach was implicitly deferential, however, because having found that consideration of mitigating factors was a constitutionally required guide to jury discretion, he decided that this requirement was met when the Texas Court of Criminal Appeals “indicated” it would interpret the statute so as to allow a defendant to adduce evidence of mitigating circumstances. 428 U.S. at 272-73.

⁹⁸ Justice Blackmun wrote none of the opinions in *Gregg* and its companion cases but he voted to uphold all of the challenged statutes. In *Furman*, dissenting, he made a deferential personal statement:

To reverse the judgments in these cases is, of course, the easy choice. It is easier to strike the balance in favor of life and against death. It is comforting to relax in the thoughts—perhaps the rationalizations—that this is the compassionate decision for a maturing society; that this is the moral and the “right” thing to do. . . .

This, for me, is good argument, and it makes some sense. But it is good argument and it makes sense only in a legislative and executive way and not as a judicial expedient.

408 U.S. at 410 (Blackmun, J., dissenting).

lative power and judicial or administrative discretion pursuant to that power (what the government may do and how it may do it).⁹⁹ The second concerns the propriety and weight of evidence and arguments presented to a court in deciding challenges to the exercise of that power or discretion. The confusion and lack of principled articulation evidenced in recent Supreme Court cases with respect to the latter is related to confusion about the former. The tendency on the part of some of the Justices to transplant various due process¹⁰⁰ or equal protection¹⁰¹ patterns of review to the cruel and unusual punishments clause reflects incomplete development of judicial theory with respect to how the clause limits the scope of permissible government action in the realm of criminal punishment.

The failure to articulate reasons for adopting a particular adjudicatory attitude risks unprincipled decisionmaking. It may be true, as Justice White thought, that a *sub silentio* shift in standard of review led to upholding the death penalty under guided discretion statutes while striking it down under mandatory ones.¹⁰² It

⁹⁹ The "what" and "how" (goals and means) of state action are perhaps never really separable. This is a cogent criticism of any theory of review that demands classifying state actions as one or the other. See Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 207-15 (1976). The coalescence of goals and means is particularly clear in the context of substantive analysis of the cruel and unusual punishments clause. It is implicit in the Court's incorporation of procedural considerations into the notion of "cruelty," see text accompanying notes 21-23 *supra*, as well as in its use of the concept of excessiveness as a measure of cruelty, see note 7 & text accompanying notes 78-80 *supra*; text accompanying notes 213-16 *infra*.

¹⁰⁰ See, e.g., note 92 & text accompanying notes 91-93 *supra*. There is nothing inherently wrong with finding a due process component in the cruel and unusual punishments clause. It certainly could be considered "cruel" for the government to inflict punishment on someone without adhering to that fundamental fairness which is the basis of due process. In certain circumstances, a lack of due process and the presence of cruelty may present alternative grounds for reaching the same result. Compare *Thompson v. Louisville*, 362 U.S. 199 (1960) (conviction without evidence of guilt held denial of due process) with *Robinson v. California*, 370 U.S. 660 (1962) (punishment based on narcotic addict status without any evidence of use or possession within the state held cruel and unusual punishment).

¹⁰¹ See, e.g., note 67 *supra*. There is also nothing inherently wrong with finding an equal protection component in the cruel and unusual punishments clause. It certainly could be considered cruel for the government to punish A more severely than B based on factors wholly extrinsic to acceptable penological goals and/or the nature and circumstances of their crimes. In another guise, in fact, an aspect of equal protection analysis figures in Type 2 proportionality cases. An argument can be made that it is cruel to punish A for crime X more severely than B, who committed crime Y, when X is not a more serious crime than Y under whatever criteria are used in determining the severity of crimes. See generally text accompanying notes 264-68 *infra*.

¹⁰² Indeed, the more fundamental objection than the plurality's muddled reasoning is that in *Gregg* . . . it lectures us at length about the role and place of the judiciary and then proceeds to ignore its own advice, the net

is apparent, however, that the difficulty the Justices have had in articulating an appropriate standard of review in eighth amendment cases is not attributable alone to their borrowing from other areas of constitutional inquiry. The principal difficulty (and probably the reason for their inconsistency) is that no one "test" seems to fit all types of cases that can arise under the clause.

For example, one shrinks from the idea that the state may take someone's life or perform a lobotomy merely because this method accomplishes a social goal which the judges deem beyond judicial question in a manner that does not appear to them to be patently irrational. At the same time, one finds equally unacceptable the notion that the state must prove that five years of imprisonment for assault, rather than ten or two, is the precisely appropriate punishment for that crime given the state's penological goals, the propriety of which the judges may subject to proof. It seems still worse to allow the state to validate a punishment by proving its imposition necessary for a worthy social goal. For the state might have a rational basis for concluding, in certain circumstances, that torture is a necessary punishment. Torture might appear to be the only punishment that would force spies to reveal what secrets they had transmitted to an enemy; or the members of the legislature might rationally believe, perhaps as the result of a public opinion poll, that mob violence would erupt and citizens would storm the prison unless it authorized torture as punishment for the perpetrators of particularly heinous murders. Assuming we agree that what the state is doing is really definable as torture, our intuitive response is that torture is exactly what the clause prohibits. No rational basis nor even a compelling governmental interest could justify such a punishment. The case would be comparable to a first amendment challenge to a law providing that no one shall speak in favor of the Republican Party at a public meeting.

Those who shrink from the "patently irrational" test where sentences of execution or lobotomy are involved might argue, along the lines of Justice Brennan,¹⁰³ that in order to uphold the statute the *state* should be *required* to prove (a) that the punishment is not assimilable to the core cases of torture and gross excessiveness, and

effect being to suggest that observers of this institution should pay more attention to what we do than what we say.

Roberts v. Louisiana, 428 U.S. 325, 363 (1976) (White, J., dissenting). Justice White, himself, is not immune from the criticism he leveled at the *Gregg* plurality, for his own adjudicatory attitude in cases challenging the death penalty has varied considerably. See text accompanying notes 52-60 *supra*.

¹⁰³ See text accompanying notes 67-74 *supra*.

(b) that the state has important and constitutionally permissible social goals that are furthered by the punishment, which (c) cannot be furthered by a punishment less drastic and irrevocable. Or, taking a less extreme position, those who shrink from the "patently irrational" test might argue, along the lines of Justice Marshall,¹⁰⁴ that in order to accomplish the invalidation of a statute the *challenger* should be *permitted* to prove that any one of the above conditions is absent.

Several Justices of the Supreme Court, however, have consistently or intermittently adopted a deferential attitude that rules out or strictly limits *all* inquiries of the "(b)" and "(c)" variety.¹⁰⁵ In so doing, they appear to have been motivated by concerns about the implications of stricter scrutiny for the other kind of situation sketched out above, involving the appropriate length of sentence for assault. Thus, Chief Justice Burger has stated:

If it were proper to put the States to the test of demonstrating the deterrent value of capital punishment, we could just as well ask them to prove the need for life imprisonment or any other punishment. Yet I know of no convincing evidence that life imprisonment is a more effective deterrent than 20 years' imprisonment, or even that a \$10 parking ticket is a more effective deterrent than a \$5 parking ticket.¹⁰⁶

Burger's concern about the slippery slope assumes that the level of scrutiny for all eighth amendment challenges ought to be the same.

It may make sense to conclude that a deferential standard of review ought to apply to run-of-the-mill prison sentences and parking tickets. The length (or range) of appropriate prison sentences for defined crimes has historically been considered a matter of state legislative policy and prerogative. If, however, one subscribes to the notion that the same standard of scrutiny must apply in all cases, review of execution, lobotomy or "necessary" torture will be rendered meaningless in the name of consistency. But the notion

¹⁰⁴ See text accompanying notes 75-80 *supra*.

¹⁰⁵ See text accompanying notes 58, 60-65, 82-83 & 92-93 *supra* (summarizing the views of Justice White, Chief Justice Burger, and Justices Rehnquist, Stewart and Powell).

As noted earlier, the "(b)" and "(c)" inquiries are not analytically distinct, see note 99 *supra*; nor are they distinct from the "(a)" inquiry in the context of the cruel and unusual punishments clause. The "(a)" question presents the merits of the constitutional issue and may be the only question the Court is truly competent to decide. The problem then becomes whether the Court can properly decide it without inquiring into the issues presented by "(b)" and "(c)."

¹⁰⁶ *Furman v. Georgia*, 408 U.S. at 396 (Burger, C.J., dissenting).

that the same standard of scrutiny must apply in all cases is wrong. Even Chief Justice Burger, who purports to apply the rational basis standard to all cases, must be thinking primarily in terms of Types 1 and 2 (Means of Punishment and Proportionality), and additionally assuming that the challenged punishments are not equivalent to torture. (Surely if a Type 1 statute authorizing drawing and quartering came before the Court, Burger would not pause to ask whether the legislature might rationally have thought that it furthered a legitimate social goal.) In Type 4 cases the Court has exhibited no marked tendency to defer to prison officials' judgments on how best to run prisons.¹⁰⁷ The Court has not in fact applied one standard to all cases, nor should it. The slippery slope concern will evaporate when consistent principles are articulated to justify varying adjudicatory attitudes.

3. The Two-Tier Approach

Having concluded that a single adjudicatory attitude is inappropriate for all eighth amendment cases, one may inquire whether borrowing the traditional two-tiered analysis invoked in substantive due process and equal protection cases¹⁰⁸ will solve the problem posed by disparate types of cruel punishment claims. Some courts and commentators have thought so.¹⁰⁹ Chief Justice Tauro, invalidating the death penalty in Massachusetts, adopted the "compelling state interest and least restrictive means test."¹¹⁰

¹⁰⁷ See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (concluding that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment"). In the *Estelle* opinion one finds no impassioned pleas (nor, indeed, any discussion of the idea) that the judges ought to defer to official judgment on what constitutes "minimal standards" for prison medical care. Justice Stevens, the lone dissenter, objected to any implication that the "deliberate indifference" standard required a finding that prison authorities acted with evil intent. *Id.* 116-17 (Stevens, J., dissenting). See Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L.L. REV. 367 (1977). See also *Furman v. Georgia*, 408 U.S. at 407 (Blackmun, J., dissenting) (drawing a distinction between the propriety of reviewing punishment imposed by the prison system and punishment authorized by the legislature).

¹⁰⁸ See notes 50-51 *supra*.

¹⁰⁹ See Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1796-97 (1970); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 82-83 (1972); Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1353-54 (1968). See also *Furman v. Georgia*, 408 U.S. 238, 287 n.34 (Brennan, J., concurring) (collecting cases that indicate a stricter scrutiny is appropriate in reviewing death sentences).

¹¹⁰ *Commonwealth v. O'Neal*, — Mass. —, 339 N.E.2d 676, 678-79 (1975). "Thus, in order for the State to allow the taking of life by legislative mandate it must demonstrate that such action is the least restrictive means toward furtherance of a compelling governmental end." *Id.*

Although he presumed the state's interest in "ensuring justice and maintaining the social compact" to be "compelling," the state was unable to prove that capital punishment was the least restrictive means toward accomplishing its goals of providing the "right" amount of deterrence, incapacitation and retribution.¹¹¹

It is clear that once a court adopts the least restrictive means requirement, and places the burden of proof on the states, a constitutional challenge to *any* criminal punishment will probably succeed. This was the very concern Chief Justice Burger expressed in the words quoted above.¹¹² To avoid such a result, the death penalty must be placed on the upper tier of scrutiny, and imprisonment on the lower; but what are the principles which dictate that placement? Chief Justice Tauro stated that "[t]here is little doubt that life is a fundamental right,"¹¹³ and the "fundamental right" formulation triggered his application of strict scrutiny.

One thesis of this Article is that the fundamental rights approach is basically sound. That is, it is appropriate for a court to consider the fundamental nature of an interest invaded by punishment in determining the standards by which the constitutionality of imposing that punishment will be decided. Nonetheless, there are two arguments that might be advanced against using the fundamental rights approach. The first is that a person convicted of crime does not possess fundamental rights in the same sense as the rest of us.¹¹⁴ This argument begs the question. By definition the convicted person no longer possesses any rights that the state may legitimately extinguish. But the eighth amendment limits permissible punishment; that is, it establishes limits on the state's authority to invade personal interests in order to punish. It recognizes rights in convicted persons. In trying to determine what interests the state may invade to punish, and to what extent, the strength of the individual's interests vis-à-vis the strength of the government's justification for invading that interest rather than a

¹¹¹ *Id.* at —, 339 N.E.2d at 686-87.

¹¹² See text accompanying note 106 *supra*.

¹¹³ — Mass. at —, 339 N.E.2d at 678.

¹¹⁴ Although the Supreme Court has not held that prisoners possess exactly the same constitutional rights as other people, *see, e.g., Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977) ("the needs of penal institutions impose limitations on constitutional rights"), it is clear that at least certain rights held to be fundamental in our society are also possessed by prisoners. *E.g., Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, J., concurring) (fourteenth amendment right to be free of racial discrimination); *see Procunier v. Martinez*, 416 U.S. 396 (1974); *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring); *Runnels v. Rosendale*, 499 F.2d 733 (9th Cir. 1974).

less fundamental one must be evaluated. Although such a judgment is related to the merits of an eighth amendment or due process claim, it is also a relevant inquiry at the threshold stage of choosing the standard of review. There is a *prima facie* case for taking a very close look at the validity of the government's justification when it proposes to punish a person by invading a very strong individual interest. Therefore, to determine what invasions of individual interests of convicted persons should trigger strict scrutiny, one must ask what interests are fundamental to all of us, criminals and non-criminals alike.

The second argument against the fundamental rights approach is based on its disparate treatment of life and liberty. If one concedes that the state's decisions to punish people by depriving them of liberty need not be reviewed on the upper tier, why should the state's decisions to punish people by depriving them of life be strictly scrutinized? One way to resolve this problem is simply not to make this concession, and some commentators have argued that the state's decisions to impose imprisonment ought to be subject to a form of strict scrutiny.¹¹⁵ Another solution would be to say that life is simply a much stronger interest than personal liberty; in the "life, liberty and property" triad it is on a plane by itself.¹¹⁶ It is perhaps true that survival is the dominant interest of most human beings, and, of course, life is the *sine qua non* of all individual rights because they all presuppose a living person as their holder.

Nonetheless, a satisfactory answer to the life/liberty criticism must recognize that certain liberty interests are indeed fundamental. "Liberty," defined as freedom from governmental coercion to do, or to refrain from doing, anything other than what one chooses, is not a fundamental right at all.¹¹⁷ Yet "liberty," more narrowly defined as the freedom from governmental restraint on physical movement and choice of environment, has consistently been treated as a fundamental individual right.¹¹⁸ The panoply of procedural safe-

¹¹⁵ See Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51 (1972); Spece, *supra* note 50.

¹¹⁶ This is the approach taken by Chief Justice Tauro in *O'Neal*, — Mass. at —, 339 N.E.2d at 691.

¹¹⁷ It is obvious that one of the basic purposes of government must be to regulate individual liberty for the benefit of society as a whole. See J. S. MILL, *ON LIBERTY* 3-6, 95-118 (A. Castell ed. 1947). Cf. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 269-72 (1977) (discussing liberty and social regulation).

¹¹⁸ The fundamental nature of the right to freedom from confinement is demonstrated by the inclusion of "liberty" in the fifth and fourteenth amendment due process clauses, as well as by the guarantee of habeas corpus. U.S. CONST. art. I, § 9, cl. 2. The right to travel has also been held to be fundamental, demon-

guards required by the Bill of Rights, many of which have been deemed fundamental,¹¹⁹ reflects societal commitment to the fundamentality of the right to freedom from physical restraint absent justification.¹²⁰ If procedural safeguards are fundamental, then *a fortiori* the underlying freedom from physical restraint that they protect must be so. Of course, the seriousness or extent of the governmental invasion of this right varies as prison sentences increase; one year in prison is a greater invasion than one day.

It is appropriate, therefore, to inquire whether or not a fundamental right is at stake when determining how rigorous an adjudicatory attitude a court should adopt toward the government's justification for imposing a given punishment. The rhetoric of two-tier analysis contributes this much that is useful. But it is also appropriate to inquire into how fundamental the right invaded by the state's action is, and into the seriousness or extent of the invasion. This conclusion may imply that review of a death sentence is governed by the compelling state interest/least restrictive means test. But it does not imply that rational basis deference is necessarily appropriate in reviewing all prison sentences; for example, rational basis deference is not appropriate in the review of a sentence of life imprisonment for possession of one marijuana cigarette. There is no more logical justification for using two stylized postures of review than for using only one.

B. *Toward a Theory of Review Under the Clause*

It is possible that the rhetoric of adjudicatory attitudes is a mode of rationalization for decisions made on other, partly inarticulate grounds. It is also possible that that rhetoric is a useful conceptual tool that can help clarify or sort issues for principled

strating that the fundamentality of physical freedom is not restricted to the context of improper imprisonment. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

¹¹⁹ Most of the rights guaranteed by the fourth, fifth and sixth amendments have been incorporated by the fourteenth amendment due process clause because they are "fundamental." See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).

¹²⁰ Their fundamentality may also be thought to derive from the right of persons to be treated by the government with equal concern and respect. See R. DWORKIN, *supra* note 117, at 273; Baker, *Utility and Rights: Two Justifications for State Action Increasing Equality*, 84 YALE L.J. 39 (1974). But the reason concern and respect imply observance of procedural safeguards may be that physical restraint is a severe invasion of personhood, which seems equivalent to saying that freedom from physical restraint is a fundamental personal interest.

decisionmaking. The latter may be true without formulating a simplistic dichotomy between standards of review and substantive standards and without taking the implausible view that adjudication is a linear process consisting of two temporal stages—first the selection of a posture, then the decision on the merits.

But if standards of review are to function as a tool for principled decisionmaking rather than as a smokescreen for holdings based on unarticulated rationales, then it is at least necessary to articulate principles that will show why a certain adjudicatory attitude is appropriate in a certain case. What follows is an initial attempt to formulate such principles in the context of cases arising under the cruel and unusual punishments clause.

1. The Principle of Risk of Error

There is a difference between deciding principles of justice or fairness in the abstract and deciding how to achieve justice or fairness in concrete situations, given the limitations of human perceptions and institutions.¹²¹ I take it as an undisputed principle that human perceptions and experiences are limited and that human decisions are fallible, and that this is no less true when humans attempt to implement their conceptions of what is ideal, desirable, appropriate or fair. If one believes that there are objective right answers in the abstract, human fallibility dictates that some decisions made in the concrete will be wrong; they are subject to a risk of error. If one holds that there are no right answers, then

¹²¹ This difference may be identical to Rawls' distinction between "ideal" and "nonideal" theories, or between "strict compliance" and "partial compliance" theories. See J. RAWLS, *A THEORY OF JUSTICE* 243-51 (1971).

The intuitive idea is to split the theory of justice into two parts. The first or ideal part assumes strict compliance and works out the principles that characterize a well-ordered society under favorable circumstances. It develops the conception of a perfectly just basic structure Nonideal theory, the second part, is worked out after an ideal conception of justice has been chosen; only then do the parties ask which principles to adopt under less happy conditions.

Id. 245-46. It is under nonideal theory that Rawls would place consideration of the "constraints [which] arise from the permanent conditions of human life" and "historical contingencies." *Id.* 246. The thrust of the argument presented herein is that ideal theory—omitting these "constraints"—need not be the place to start thinking about justice in human institutions. Given these "constraints," there is no basis for believing that attempts to implement an ideal solution will not result in greater injustices than the actual implementation of a solution less consonant with ideal theory. Put another way, our "ideals" ought not to be constituted by ignoring our "constraints." (This skepticism is analogous to doubts about the capability of economic theory to describe real-world optimal resource allocation in light of the so-called "Theory of the Second-Best." See Lipsey & Lancaster, *The General Theory of Second Best*, 24 *REV. ECON. STUDIES* 11 (1956).)

decisions can never be objectively wrong although some will inevitably be inconsistent with prior results; they are subject to a risk of arbitrariness.¹²²

Most who philosophize about fairness or justice take into account the inherent fallibility of human perceptions and institutions at some point in their theories. Crucial differences between their approaches often depend upon the point in their theories at which a risk of error or risk of arbitrariness principle is taken into account. At the heart of our legal system, and for that matter our moral system, is the principle of formal equality: we ought to treat like cases alike and we ought to treat relevantly different cases differently. At some point in any legal theory, and the point will vary, we must take into account the inability of human institutions always to discern properly the relevant differences. For example, consider the practice of indeterminate sentencing. Those who would defend it might argue that it enables the criminal justice system to consider individual differences among crimes and criminals, and thereby to treat all criminals more fairly. Those who would condemn the practice would not fault this argument in the abstract, but might argue instead that society does not possess and is not capable of designing institutions that can discern these relevant differences consistently. Therefore, opponents of indeterminacy argue that regardless of what might be considered fair to individuals in the abstract, we can achieve fairer treatment in practice if determinate punishment is consistently applied to whole classes of criminals.¹²³

As another example, consider the idea that all offenders ought to be treated rather than punished.¹²⁴ In the abstract the idea seems humane; however, it necessarily presupposes that sociological and psychiatric knowledge is complete enough, and therapeutic technology accurate enough, to accomplish the results that the therapists intend. The theory assumes as well that each individual therapist can fully implement that knowledge and technology. These assumptions would be questioned by many who consider existing knowledge to be impressionistic and scanty and existing therapies to be frequently counterproductive and misguided. (The theory also

¹²² See note 130 *infra*.

¹²³ See generally Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978) (presenting the opposing arguments and criticizing the efficacy of determinate sentencing).

¹²⁴ This idea is most often associated with Lady Barbara Wootton. See, e.g., B. WOOTTON, *CRIME AND THE CRIMINAL LAW* (1963).

necessarily presupposes that it is morally justifiable for therapists to alter personalities in ways other than those that the people subjected to treatment choose. This presupposition has been emphatically denied by those who argue that people have a right to live under a punishment system rather than a treatment system.)¹²⁵

Considering such human limitations, it is not surprising that the error principle figures prominently, though implicitly, in accepted principles of adjudication. When a hard case comes before a court, there either exists a single correct decision dictated by the totality of our laws and institutions, or there does not. If there is a right answer, there is no guarantee that the judge will decide the case correctly because courts, like all human institutions, are fallible. Principles of adjudication, however, ought to tell the judge on which side she should choose to risk error. A *prima facie* application of the error principle determines the judge's standard of review or level of scrutiny; the error principle also figures in deciding the case for one side or the other on the merits.

There are two aspects of the risk of error principle: the first relates to the *likelihood* of error, the second to the *cost* or gravity of error. In cases where the likelihood of error can be estimated, principles of adjudication tell the trier to choose the side where error is less likely. The "preponderance of the evidence test," for example, is a principle of adjudication relating to the likelihood of error. If the trier thinks fact *X* is more likely to be true than not, then she is to decide *X* is true, even though this decision is quite possibly wrong.

The second aspect of the principle, the cost or gravity of error, is of greater importance to the present discussion. It is relevant both in judging *how much* less a likelihood of error the trier should demand on one side of the case before deciding for that side, and in selecting a result in cases where it is not possible to tell how the risk of error is distributed. Considerations of gravity also dictate that a trier ought to risk error *in favor* of the side presenting stronger interests which would be infringed if the decision wrongly went against that side, and do so even in some cases where the likelihood of error favors the opposite side. Because fundamental individual rights are considered very strong interests, courts will normally prefer to risk error in favor of the individual claiming such a right.¹²⁶ This principle is manifested in the presumption that accused persons are innocent until proven guilty and the requirement

¹²⁵ See Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968).

¹²⁶ See notes 118-20 & accompanying text *supra*.

that guilt be established beyond a reasonable doubt, even where it is more likely than not that the accused is guilty.¹²⁷ The same principle underlies the first amendment "chilling effects" doctrine: it is preferable to risk allowing some "unprotected" speech to take place than to risk curtailing the individual's right to speak.¹²⁸ On the level of standards of review, this aspect of the error principle is the basis of the strict scrutiny doctrine.

The argument presented here may be reduced to the idea that the propriety of a standard of review should be governed by one question: Assuming that no court can decide all cases correctly, on which side is it preferable to risk error? In a case involving indi-

¹²⁷ See, e.g., *Lego v. Twomey*, 404 U.S. 477, 494 (1972) (Brennan, J., dissenting); *In re Winship*, 397 U.S. 358, 369-72 (1970) (Harlan, J., concurring). In *Winship* Justice Harlan stated:

[E]ven though the labels used for alternative standards of proof are vague and not a very sure guide to decisionmaking, the choice of the standard for a particular variety of adjudication does, I think, reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations.

. . . [A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication

. . . .
In a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . .

Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—[the] margin of error [in factfinding] is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

. . . I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

397 U.S. at 369-72 (citation omitted). In Justice Brennan's dissent in *Lego v. Twomey*, he stated:

If we permit the prosecution to prove by a preponderance of the evidence that a confession was voluntary, then . . . we must be prepared to justify the view that it is no more serious in general to admit involuntary confessions than it is to exclude voluntary confession Compelled self-incrimination is so alien to the American sense of justice that I see no way that such a view could ever be justified.

404 U.S. at 494. See Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).

Although beyond the scope of the present article, it would clearly be fruitful to apply the risk of error principle to the doctrine of harmless constitutional error. See generally Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976); Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973).

¹²⁸ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852-58 (1970).

vidual interests, if it is preferable to risk error on the side of the government, then a deferential stance is proper; if it is preferable to risk error on the side of the individual, then an activist stance is called for. Contrary to the apparent views of Justice Rehnquist¹²⁹ it is not always preferable to risk error on the side of the government. Rather, the question must be considered in the light of principles of justice and fairness. When crucial individual interests are at stake, many of which are enumerated in the Bill of Rights, our system recognizes that it is often better to risk error on the side of the individual. Given that *prima facie* recognition, the extent to which error on the side of the individual should be risked may, in cases where the gravity factor is not peremptory, depend on the demonstrable strength and certainty of the countervailing governmental interests. This appears to be the kernel of the compelling state interest doctrine.

The effect of the error principle¹³⁰ is most obvious with respect to the question of properly allocating the burden of persuasion on relevant substantive issues. It dictates placing the burden of persuasion on that party against whom it is more preferable to risk error. With respect to the more complex question of adjudicatory attitude, the error principle leads to a spectrum theory of adjudication rather than to the two-tier approach. This follows from the potentially infinite variations in the two determinative aspects of the principle, the likelihood of error, and the gravity of error. Considering the gravity aspect of risk of error, there is always an interest in letting the judgment of a legislature stand. (We might say there is a *prima facie* duty to respect majority rule.) The extent to which a judge is predisposed to favor this interest by adopting a deferential stance should depend upon the risk of error posed by a decision

¹²⁹ See text accompanying notes 64-65 *supra*.

¹³⁰ Although this Article argues in terms of a risk of error principle rather than a risk of arbitrariness principle, its conclusions do not seem to depend upon the existence of objective right answers. Ronald Dworkin's claim that a right answer does exist in every case (even though the court may not discern it) has attracted a recent flurry of commentary. See R. DWORKIN, *supra* note 117, at 81-130. Critiques of Dworkin's view are contained in Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972); Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHIL. Q. 151 (1971); Note, *Dworkin's "Rights Thesis,"* 74 MICH. L. REV. 1167 (1976). If one assumes, as does Hart, that in a hard case there exists no right answer, but only the judge's discretion, see H. L. A. HART, *THE CONCEPT OF LAW* 123-50 (1961), then a modified risk analysis by which one seeks to minimize results unjustifiably inconsistent with results in "like" cases is appropriate. It is then preferable to risk arbitrariness in favor of the side for which a decision is less likely to be arbitrary or, when the likelihood of arbitrariness cannot be determined, in favor of the side for which an adverse decision would infringe upon stronger (and/or more certain) interests.

adverse to the interests of the individual challenger.¹³¹ The next section will examine the factors relevant to risk of error analysis in the eighth amendment context.

2. Relevant Factors for Allocating Risk of Error

Although no systematic risk of error analysis appears in the cruel and unusual punishments clause case law, a number of factors that have figured in the Court's discussions provide the starting point for such an analysis. Irrevocability is one such factor. Sterilization, lobotomy, and death are all irreversible, and the government cannot cancel or even ameliorate the effects of such actions should they be wrongly imposed as punishment. Irrevocability strongly calls for strict scrutiny,¹³² as Justices Marshall and Brennan explicitly recognized in the death penalty cases.¹³³ Though irrevocability was not cited as a principle explicitly calling for strict scrutiny by Justices Stewart, Powell and Stevens, its pres-

¹³¹ There may be some categories of individual interests so strong that the cost of error analysis will be peremptory. For instance, if the individual right to freedom of speech were such a strong interest, then the "chilling effects" doctrine would be formulated so stringently that courts would decide in favor of individuals engaging in speech even if the risk of curtailing protected speech flowing from the challenged governmental regulation was very slight when compared with the risk of curtailing the government's permissible objectives. On the *prima facie* level of selecting a standard of review, the doctrine would require that, even if the governmental justification appeared strong and certain, and the harm to individuals speculative, the government be put to its proof.

¹³² Of course, even one day in prison is irrevocable in the sense that all past events and their resultant effects on human beings are irrevocable. Yet, although it might be difficult to articulate, most people intuitively recognize a distinction between the irrevocability of everything and the irrevocability of death or mutilation. The latter is the strong sense of irrevocability referred to here. It encompasses irreversible deprivations of attributes or capacities essential to, or at least closely connected with, complete personhood. At a minimum, it encompasses irreversible deprivations of certain physical or mental functions included in our stereotype of a person. Someone who has had her hands cut off for stealing does not thereby cease to be a complete person; yet when one thinks of what a person is, surely the stereotype has hands. The point at which the strong sense of irrevocability blends into the irrevocability of everything is unclear. Imprisonment will not be considered irrevocable in the strong sense because a prisoner can think, write, talk, feel and may someday be released. Yet if it were possible to give someone a pill that instantly induced in her the physical and mental effects of having spent a lifetime in a cell, an irrevocable deprivation in the strong sense would probably have taken place. At any rate, it is the clear cases of irrevocability in the strong sense, of which death is the clearest, that give rise to its use as a factor in allocating risk of error in adjudication. Incidentally, because this strong sense of irrevocability is derived from attributes and capacities important to personhood, this factor overlaps with an error analysis based on the fundamental nature of individual rights. See text accompanying notes 108-20 *supra*.

¹³³ See *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring); *id.* 346 (Marshall, J., concurring); see also *Commonwealth v. O'Neal*, — Mass. —, 339 N.E.2d 676, 678 n.2 (1975).

ence had a similar effect in their plurality opinion in *Woodson*.¹³⁴ Because death is final, the *Woodson* Court constitutionally required that the death penalty may be imposed only if certain procedures are followed:

Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.¹³⁵

Irrevocability has led courts to adopt strict scrutiny in cases presenting other legal and factual issues.¹³⁶ The gravamen of irrevocability analysis is that all human judgments are fallible. When deprivation is visited on an individual in the name of the government because it is thought just, it is always possible that more facts will be discovered or prevailing patterns of thought will change, and that the deprivation will later be thought unjust. In those cases the long-run viability of the system would be enhanced if the deprivation could be undone or mitigated.¹³⁷ Because irrevocable

¹³⁴ *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

¹³⁵ *Id.* 305.

¹³⁶ See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *In re Karen Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) (dealing extensively with the irrevocability of the consequences of disconnecting life support apparatus).

¹³⁷ Instances of later-discovered factual error in the criminal justice system abound. Studies of the frequency of such errors, for example, cases in which an innocent person was punished for a crime later confessed to by another, are cited by Justice Marshall in *Furman*. 408 U.S. at 366 n.156 (Marshall, J., concurring).

Prevailing thoughts about what is considered just may also change over time. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Weems v. United States*, 217 U.S. 349, 373 (1910). Sometimes these changes are reflected in new interpretations of the Constitution. A famous example is *Gideon v. Wainwright*, 372 U.S. 335 (1963), incorporating the right to counsel in state criminal proceedings. It may be considered an affirmation of our constitutional system that *Gideon* was found innocent upon retrial with the assistance of counsel. See A. LEWIS, *GIDEON'S TRUMPER* 223-38 (1964). As part of his argument against the death penalty, former Justice Goldberg has pointed out, by inviting comparison of *Williams v. Georgia*, 349 U.S. 375 (1955), with *Fay v. Noia*, 372 U.S. 391 (1963), that execution forecloses completion of this constitutional social expiation process. In both *Williams* and *Noia* defendants convicted of first degree murder had failed to raise claims challenging the constitutionality of their convictions. *Noia* was sentenced to life imprisonment and was later freed when the Court permitted collateral attack on his conviction. *Williams*' conviction was also constitutionally deficient but collateral attack was preempted because he had been sentenced to death and executed. See Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355, 362 n.35 (1973).

Important changes in societal values concerning justice are not always reflected in constitutional decisions; nonetheless, they may cause earlier, and now irrevocable, actions of the legal system to be heartily regretted. As an example, consider the

deprivations cannot be undone or mitigated it is appropriate to weigh and consider them with the utmost care in the first instance.

There may be a category of individual interests that are so vital that even the utmost care is not sufficient to protect them from possibly erroneous irrevocable government invasions, regardless of what competing governmental interests are at stake. Charles L. Black has argued that life is such an interest.¹³⁸ Rejecting the death penalty on account of the inherent residual risks in our system of justice does not imply, of course, that our system of justice is too risky to impose lesser punishments. Yet in *Gregg v. Georgia*, Justice White referred to this argument as "an indictment of our entire system of justice," which "cannot be accepted as a proposition of constitutional law."¹³⁹ The Black argument, if accepted, can be limited as a proposition of constitutional law to instances in which life is at stake. It is an indictment of our entire system of justice only in the sense that it accuses our system of being fallible to some degree. Such an indictment cannot be denied. Against this, however, it may be contended that the death penalty serves to further the same interest in *preserving* life.¹⁴⁰ An appropriate response to this deterrence defense is that in this case, and perhaps in this case only, it is proper to require the government to *prove* that the death penalty does save lives. If the nature of the case is such that it cannot be proven, then the government must relinquish its claim.¹⁴¹

extraordinary proclamation issued by the Governor of Massachusetts on July 19, 1977, which stated, in part:

WHEREAS: [The people of Massachusetts] recognize that all human institutions are imperfect, that the possibility of injustice is ever-present, and that the acknowledgment of fault, combined with a resolve to do better, are signs of strength in a free society

. . . .

Now, THEREFORE, I, Michael S. Dukakis, Governor of the Commonwealth of Massachusetts . . . do hereby proclaim Tuesday, August 23, 1977, "NICOLA SACCO AND BARTOLOMEO VANZETTI MEMORIAL DAY"; and declare, further, that any stigma and disgrace should be forever removed from the names of Nicola Sacco and Bartolomeo Vanzetti . . . and so, from the name of the Commonwealth of Massachusetts

See N.Y. Times, July 20, 1977, at 18.

¹³⁸ C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974).

¹³⁹ 428 U.S. at 226 (White, J., concurring); see *Roberts v. Louisiana*, 428 U.S. 325, 348-49 (1976) (White, J., dissenting).

¹⁴⁰ See, e.g., *Coker v. Georgia*, 433 U.S. 584, 616 (1977) (Burger, C.J., dissenting) ("[o]ur concern for human life must not be confined to the guilty"); *Roberts v. Louisiana*, 428 U.S. at 355 (White, J., dissenting) (mandatory death penalty statutes are "solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons").

¹⁴¹ Even if the deterrence proposition could be proved (leaving aside the question of how to decide what would constitute proof), the death penalty would

This, as we have seen, was the effect of putting the state to its proof on the death penalty in Massachusetts.¹⁴²

The severity (or "enormity") of a punishment is another factor that suggests the desirability of stricter review.¹⁴³ This is a measure of the strength of the individual interest involved, as the extent of the pain or suffering entailed by the punishment, and the question whether the interest invaded by the punishment is a fundamental right.¹⁴⁴ A fundamental rights analysis measures the extent to which the individual interest at stake has been institutionally identified and protected, perhaps by the Constitution or prior judicial decisions.

Punishments and governmental interests may also have been institutionally sanctioned, and that factor is likewise relevant to the risk of error approach to the scrutiny spectrum. Whether or not the challenge is to a legislative enactment, and whether or not the punishment is usual are inquiries concerning the extent of this institutional sanction. A legislative enactment is entitled to more deference than the act of a sentencing authority or penal official; if the punishment authorized by the legislature is not unusual (not atypical) the factor of institutional sanction is weightier still.¹⁴⁵ The presence of these factors would indicate, *ceteris paribus*, deference for punishments like fines and imprisonment and stricter scrutiny for punishments like denationalization and making confessional speeches before civic groups.¹⁴⁶ The closeness of a given punishment to the "core cases" of the clause, which include torture and (perhaps less clearly) gross excessiveness,¹⁴⁷ is another factor relevant to the risk of error and to how the judicial system should respond in the face of that risk. The vagueness and ambiguity of the concept of cruelty will lead people and judges to adopt varying

not be justified unless this type of utilitarian calculation is accepted as an appropriate justification of punishment. See text accompanying notes 224-56 *infra*.

¹⁴² See text accompanying notes 110-13 *supra*.

¹⁴³ See, e.g., *Furman v. Georgia*, 408 U.S. at 286-88 (Brennan, J., concurring).

¹⁴⁴ Cf. *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (expatriation involves the loss of "the right to have rights").

¹⁴⁵ See note 8 *supra*. The unusualness of punishment could be determined by the rarity of its use in other jurisdictions or in the history of Anglo-American law.

¹⁴⁶ In *United States v. Blankenheim*, as a condition of probation corporate executives who fixed prices in violation of the Sherman Act were required to "make an oral presentation before twelve (12) business, civic or other groups about the circumstances of this case and [their] participation therein." *United States v. Blankenheim*, No. CR-74-182-CBR (N.D. Cal., filed Nov. 1, 1974) (judgment and order of probation and fine); see Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590 (1977).

¹⁴⁷ See text accompanying notes 163-64 *infra*.

notions of what amounts to cruelty. This uncertainty creates a risk of injustice through arbitrariness. Moreover, the likelihood and gravity of error both increase as punishments, the "cruelty" of which is doubtful, approach the core cases of punishments forbidden by the eighth amendment. All other things being equal, it would be better to risk error in favor of the individual who challenges a punishment close to the core cases. For example, this factor suggests strict scrutiny for punishment (perhaps denominated aversion therapy) involving the administration of drugs that induce nausea and terror. The symptoms these drugs produce resemble the effects of torture.¹⁴⁸

Another factor related to the meaning of "cruelty," as well as to the strength of the individual interest at stake, is the degree of pain caused by a particular punishment, and whether that pain is measurable or controllable. If the degree of pain is very high, the punishment may be viewed as "enormous" and a strong individual interest will have been infringed.¹⁴⁹ If it is not measurable or controllable, then there is a great risk that application of the punishment will be arbitrary, and arbitrary infliction of punishment is itself cruel, as the Supreme Court has recognized in its death penalty decisions.¹⁵⁰

In choosing a standard of review one might also consider the motives of the inflictors of punishment. On the legislative level, this factor relates to appropriate reasons for punishment, or whether penological goals further social utility. A statute whose language avowed (or the circumstances of whose enactment showed) that its sole aim was to make people suffer should be subject to strict scrutiny for cruelty. On the administrative level, this factor would most often require examination of the reasons for prison officials' acts. Conditions of confinement would come under strict scrutiny for cruelty under this factor if officials intended to make inmates suffer. (Conditions of confinement might come under strict scrutiny for cruelty regardless of official motivation, if they amount to "enormous" punishment or severe invasion of fundamental rights or are assimilable to the core cases of cruelty.)

The strength of governmental interests is a broad factor that comprehends both the social importance of punishment (penological goals) and the degree of certainty that the goals are being served by a

¹⁴⁸ See, e.g., *Mackey v. Procunier*, 477 F.2d 877 (9th Cir. 1973) (use of succinylcholine which causes paralyzing fright). See Note, *supra* note 27, at 897-900.

¹⁴⁹ See text accompanying notes 143-44 *supra*.

¹⁵⁰ See text accompanying notes 32-47 *supra*.

particular form of punishment. If a challenged punishment closely serves a permissible social goal, that factor will suggest that deference to the legislative judgment is indicated. Nevertheless, it is important to realize that when a punishment is challenged the governmental interest in retaining it is the net incremental social benefit to be derived from using that punishment instead of its next preferred alternative.

3. Applications of the Risk of Error Principle

To summarize the foregoing discussion, the following factors have been suggested to be relevant to determining the standard of review for cruel and unusual punishments cases:¹⁵¹

1. The irrevocability of the punishment;
2. The strength of the individual interest invaded by the punishment—for example, is it a fundamental right protected by the Constitution or closely related to a constitutionally protected interest?
3. The “enormity” or severity of the punishment;
4. The nature of the challenged governmental act or authorization, that is, whether it is a legislative enactment, an act within the discretion of a judicial sentencing authority, or an act of prison officials;
5. The unusualness of the punishment, that is, has it been sanctioned in institutional history?
6. The closeness of the punishment to the core cases under the clause, torture and gross disproportionality;
7. The degree of physical or mental pain imposed by the punishment and whether it is measurable or controllable;
8. The motives of the inflictors, including the validity of the enacted penological goals and whether acts of prison officials were “deliberately” intended to cause suffering; and
9. The strength of the governmental interest claimed to be furthered by the punishment, comprehending both the social

¹⁵¹ This list is informal in several respects. It is not exhaustive, nor is each factor discrete from the others. The listed concerns are part of a cluster that may be equally well served by other formulations. In addition, factors relating to institutional sanction incorporate past moral judgments made by the legal system, and hence are not of the same linguistic order as factors calling for present moral judgment, such as the closeness of the challenged punishment to the core cases under the clause.

utility of the government's goal and the degree of certainty that the challenged punishment implements that goal.

All of these factors, except the second, when examined in the context of challenges to punishment by imprisonment suggest the need for some degree of deference to the legislative judgment. If the sentence appears grossly disproportionate, stricter scrutiny may be called for.¹⁵² Though some may question whether imprisonment actually serves the goals of rehabilitation or deterrence, it at least accomplishes the goals of retribution and isolation, which are usually deemed penologically appropriate.¹⁵³ Imprisonment is neither unusual, irrevocable (in the strong sense)¹⁵⁴ nor enormous; it has long been sanctioned as a means of punishment, is imposed pursuant to legislative enactment, and may be controlled in the extent to which it inflicts pain. Because imprisonment invades a fundamental right, however, I would argue that least restrictive means analysis is appropriate when it is challenged, especially if the interest in freedom from restraint is severely invaded, as it would be by a long sentence. The standard of review, given the other factors relevant to the risk of error analysis, should, however, be somewhat deferential. This may be accomplished by placing the burden of persuasion as to the least restrictive means issue on the convicted person challenging the length of her sentence.

Judicially imposed innovative sentences, such as public confession,¹⁵⁵ should probably be subject to a somewhat stricter scrutiny, perhaps by requiring the government to bear the burden of persuasion on the validity of the goals it seeks to serve. A factor strongly indicating that it is preferable to risk error on the side of individual interests¹⁵⁶ in this case is the punishment's "unusualness"; in addition, the sentence lacks legislative authorization, and

¹⁵² See text accompanying notes 13-16 *supra*.

¹⁵³ Generally speaking, there have been advanced four theories as the basis upon which society should act in imposing penalties upon those who violate its laws. These are: (1) to bring about the reformation of the evil-doer; (2) to effect retribution or revenge upon him; (3) to restrain him physically, so as to make it impossible for him to commit further crimes; and (4) to deter others from similarly violating the law.

Commonwealth v. Ritter, 13 Pa. D. & C. 285, 289-90 (1930). See generally S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 1-39 (2d ed. 1975) (collecting cases and commentaries).

¹⁵⁴ See note 132 *supra*.

¹⁵⁵ See note 146 *supra*.

¹⁵⁶ There is a paradox in speaking of the risk of error "favoring the individual" in cases in which a specific individual prefers the challenged punishment to what would otherwise be the alternative. Price-fixers may prefer confessional speeches to prison; Gary Gilmore preferred death to life imprisonment. See note 224 *infra*.

the claim that such sentences implement the goals of punishment may be considered speculative. On the other hand, supporters of such a sentence may claim that it has unique social value in effecting better general deterrence while sparing offenders the harshness of imprisonment; in addition, the sentence is neither irrevocable nor enormous. Of course, if an innovative punishment seems grossly disproportionate, humiliating or degrading, it would be subject to very strict scrutiny because of its closeness to the core cases under the clause.

In the case of the death penalty, the strongest factors in support of risking error on the side of the individual are irrevocability, enormity, and the strength of the fundamental individual interest in survival. The strongest factors that support placing the risk of error on the side of the government are those involving institutional sanction—the death penalty has been enacted by many state legislatures and it has a long history in Anglo-American jurisprudence. The state interest in the social goals of deterring murder and/or exacting retribution should not weigh heavily in this calculus, because of the relatively insignificant, if any, net incremental benefits provided by execution as opposed to life imprisonment. Incremental gains in deterrence and retribution must also be weighed against the extra quantum of social harm, if any, attributable to the existence of the death penalty.¹⁵⁷

The death penalty is not *prima facie* assimilable to the core cases of cruelty. Substantive analysis must inquire whether, on reflection, it should nevertheless be considered cruel. In that analysis should it be presumed that past institutional judgments were correct?¹⁵⁸ The conjunction of the factors of irrevocability, enormity, and fundamental right peculiar to the death penalty demands a searching analysis with no initial presumptions in favor

Does the eighth amendment "protect" an individual from the infliction of a certain punishment when, given the circumstances, she would choose it if she could? At present I have no satisfactory answer to the question whether one can consent to the imposition of cruel and unusual punishment. The answer probably depends upon whether the problem is looked at from the point of view of the specific individual (subjective) interest or from the point of view of the collective interest in protecting the generalized individual interest in freedom from degradation at the hands of the government. See text accompanying notes 238-40 *infra*. If one adheres to the collectivist viewpoint, the government cannot inflict a degrading punishment even if the individual either does not view it as degrading or she desires degradation in light of the alternatives. If the question is evaluated from the individualist viewpoint, this seems both paternalistic and unfair.

¹⁵⁷ See note 255 *infra*.

¹⁵⁸ See note 151 *supra*.

of the past.¹⁵⁹ The death penalty should be subject to strict scrutiny for cruelty.

IV. THE SUBSTANTIVE STANDARD

The lack of consensus regarding the level of judicial scrutiny applicable to the cruel and unusual punishments clause is arguably a symptom of a more fundamental conflict over the substantive meaning of the clause, as has been suggested earlier.¹⁶⁰ The concept of cruelty poses analytical difficulties on two levels. First, there is an underlying hesitancy on the part of at least one member of the Court to "rewrite" the Constitution by interpreting the clause via evolving standards. Second, even if an evolving or variable approach to the clause is accepted, there is additional disagreement over whether objective indicators of public sentiment, or the judges' own moral insights, or other principles are the proper tools to decide what is cruel under the clause.

Part IV reviews the major approaches to the clause proposed by the Justices of the present Court and analyzes the problems presented by various methods of interpretation. Consideration of these problems leads to the conclusion that it is appropriate to determine the clause's substantive meaning on the basis of accepted philosophical justifications for punishment when these are seen in their relationship to a moral consensus on what is cruel.

A. *Fixed and Variable Meaning Alternatives*

There is a fixed or historical interpretation of the cruel and unusual punishments clause which holds that the clause proscribes only punishments thought cruel in 1789. One recent proponent of this view was the late Justice Black.¹⁶¹ On the present Court, Justice Rehnquist is the only avowed adherent.¹⁶²

¹⁵⁹ Past judgments will figure in the substantive analysis because whether something has been thought cruel in the past is relevant to whether it is cruel today.

¹⁶⁰ See text accompanying notes 99-102 *supra*.

¹⁶¹ See *McGautha v. California*, 402 U.S. 183, 225-26 (1971) (Black, J., concurring). Black's articulation of the historical approach to the claim that the death penalty was cruel and unusual was as follows:

In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment. Although some people have urged that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never believed that lifetime judges in our system have any such legislative power.

Id. 226.

¹⁶² See *Woodson v. North Carolina*, 428 U.S. 280, 308 (1976) (Rehnquist, J., dissenting). Justice Rehnquist rejects the "evolving standards of decency" approach

It is widely accepted that the Framers' major reason for the inclusion of the clause in the Bill of Rights was to prohibit the infamous tortures used during the Stuart reign in England, such as the thumbscrew and the rack.¹⁶³ These methods of punishment have been referred to herein as core cases under the clause. There is also evidence that the purpose of the phrase in the English Bill of Rights from which the Framers adopted the cruel and unusual punishments clause was to prohibit excessively severe punishments not sanctioned by the legal system.¹⁶⁴ Gross excessiveness has been referred to herein as a second, perhaps less clear, core case.

Although these historical meanings illustrate the core cases, they do not exhaust the meaning of the clause. They cannot, for it is evident that the clause now proscribes punishments not thought cruel in 1789. Whipping and ear-cropping were thought perfectly proper, neither torturous nor excessive, when the Bill of Rights was born.¹⁶⁵ Yet today, courts would not uphold them as permissible means of punishment.¹⁶⁶

An alternative to the historical view is the notion that the meaning of the clause varies over time. There are two basic arguments for variable meaning. First, one can argue that although the Framers meant to proscribe cruelty as they conceived it, prevailing ideas of cruelty have changed since 1789, and the Court must be free to reject the Framers' obsolete notions. Second, one can argue that the Framers intended to proscribe cruelty, the moral concept, whatever its content or dimensions would be at any particular stage in

of the Court majority and suggests that an historical approach is the appropriate method of analysis. He remarked in *Woodson*: "[I]t is by no means clear that the prohibition against cruel and unusual punishments embodied in the Eighth Amendment . . . was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights." *Id.*

¹⁶³ See *Furman v. Georgia*, 408 U.S. 238, 316 (1972) (Marshall, J., concurring).

¹⁶⁴ See *Granucci*, *supra* note 8, at 852-60.

¹⁶⁵ See 1 ANNALS OF CONG. 754 (Gales & Seaton eds. 1789). During the first Congress' debates on the adoption of the Bill of Rights, Mr. Livermore articulated the views of his contemporaries: "[I]t is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel?" *Id.* A further indication of this outlook is contained in Congress' first criminal statute, prescribing 39 lashes for larceny and one hour in the pillory for perjury. Act of April 30, 1790, ch. 9, §§ 16-18, 1 Stat. 116 (1790). See *Furman v. Georgia*, 408 U.S. at 262, 263 n.6 (Brennan, J., concurring).

¹⁶⁶ See *Ingraham v. Wright*, 430 U.S. 651, 668-71, 684 n.1 (1977); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968). The Court has not specifically embraced the proposition that any paddling or flogging violates the eighth amendment, but the *Ingraham* Court implicitly recognized the "cruel and unusual" character of punishments such as whipping and ear-cropping.

history.¹⁶⁷ For purposes of formulating the second argument it will suffice to suppose that a particular *conception* of cruelty (the content or dimensions of the general *concept* in a given individual or community, or during a particular time period) consists, roughly, of the list of things that are considered cruel under that conception, together with the principles capable of generating new additions to the list.¹⁶⁸ This argument, then, asserts that the Framers did not intend to enshrine in the Constitution only their own list of things considered cruel, but rather that the concept of cruelty itself should limit punishment. They intended the list of cruel punishments to vary as prevailing conceptions of cruelty evolved.

The first argument for variable meaning is vulnerable because it "suggests that the Court must change what the Constitution enacted."¹⁶⁹ The second argument is more defensible because, under its formulation of the clause's meaning, fidelity to the text requires judges to address the moral issue, by applying the moral insight of their time to the challenged punishment.¹⁷⁰ This allows the Court to reject the historical view through fidelity to the text. One ground for accepting the second argument is that the Framers could have employed specific language instead of a general concept if they intended to adopt a particular conception of cruelty.¹⁷¹ For example, in the sixth amendment the Framers listed specific requirements for criminal trials that spell out a particular theory of the concept of a fair criminal process. The eighth amendment, likewise, could have provided that no one shall be put to the rack or the thumbscrew, rather than that no one shall be cruelly punished.

Most members of the Court have now adopted the view that the meaning of "cruelty" in the clause is variable, although it is not clear that they believe they have arrived at this position through fidelity to the text. The position most frequently stated is that the clause "must draw its meaning from the evolving standards of

¹⁶⁷ See R. DWORKIN, *supra* note 117, at 135-36. These two forms of argument are based upon Dworkin's analysis.

¹⁶⁸ This definition relies on a conviction that a general intuitive notion of a moral concept will be sufficient for purposes of this analysis. The definition in the text is influenced generally by L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 124-29 (1953). This Article will not attempt to elaborate a rigorous morphology of the notion of a moral concept.

¹⁶⁹ R. DWORKIN, *supra* note 117, at 136.

¹⁷⁰ See *id.* 136-37. Dworkin points out that the argument may not stop here. He asserts that fidelity to the text is not necessarily determinative in constitutional adjudication.

¹⁷¹ *Id.* 136.

decency that mark the progress of a maturing society.”¹⁷² This phrase has become one of those movable semantic units that acquires a life of its own as courts repeatedly invoke it. Taking the phrase at face value, however, it quite clearly expresses the view that the clause is meant to embody the moral concept of cruelty, and that specific conceptions of cruelty may vary over time.¹⁷³ Thus, the import of the clause’s meaning, as construed by the majority of the present court, is that the appropriate constitutional standard must be dictated by society’s current conception of cruelty.

¹⁷² *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (Warren, C.J.). The language of the *Trop* Court has been subsequently adopted by numerous justices who adhere to a variable approach to the clause’s meaning. See *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (Marshall, J.); *Roberts v. Louisiana*, 428 U.S. at 336 (Stevens, J.); *id.* 352 (White, J.); *Woodson v. North Carolina*, 428 U.S. at 301 (Stewart, J.); *Gregg v. Georgia*, 428 U.S. at 173 (Stewart, J.); *id.* 227 (Brennan, J.); *Furman v. Georgia*, 408 U.S. at 242 (Douglas, J.); *id.* 269-70 (Brennan, J.); *id.* 329 (Marshall, J.); *id.* 383 (Burger, C.J.); *id.* 409 (Powell, J.).

Perhaps the most eloquent statement of the variable meaning position was articulated by Justice McKenna in 1910:

With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts [sic], or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say “coercive cruelty,” because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister.

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, “designed to approach immortality as nearly as human institutions can approach it.” The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

Weems v. United States, 217 U.S. 349, 372-73 (1910).

¹⁷³ The phrase also suggests that society is changing for the better or making moral progress which will be reflected in evolving conceptions of cruelty. Acceptance of this notion is not essential to the argument for variable meaning.

B. *Positive and Normative Approaches to Variable Meaning*

Once a variable meaning approach to the clause is accepted, it is necessary to face the crucial question in the jurisprudence of the cruel and unusual punishments clause. To what sources should judges turn in seeking contemporary moral insights on cruelty? There are two basic approaches to this question. The first approach, which might be called positive, seeks objective indications of whether or not a specific punishment is considered cruel by society at large. The second, which might be called normative, identifies principles encompassing the core cases of cruelty, and from these principles, assimilates new or doubtful cases into the concept of cruelty. Assuming, as was suggested earlier,¹⁷⁴ that the current conception of cruelty consists of a list of things considered cruel, together with the principles capable of generating new additions to the list, the positive approach seeks evidence of what is on the list, while the normative approach seeks the principles by which we determine whether an uncertain item belongs on the list.

1. The Positive Approach

The positive approach to variable meaning has been applied by Justice Powell¹⁷⁵ and Chief Justice Burger in the death penalty cases. Justice Powell has argued that legislative enactments¹⁷⁶ and the sentencing behavior of juries¹⁷⁷ are the primary indicators of whether specific punishments are acceptable under contemporary standards of decency. In addition, he has suggested that referenda and public opinion polls may be utilized as indicators of public sentiment.¹⁷⁸ Chief Justice Burger has stated that contemporary moral judgments regarding the boundaries of *extreme* cruelty (adding an unexplained gloss to the constitutional text) may be inferred

¹⁷⁴ See text accompanying note 168 *supra*.

¹⁷⁵ Justice Powell has not completely accepted the positive approach as the appropriate method of eighth amendment analysis. His recent opinion in *Coker* acknowledged that the ultimate constitutional decision is vested in judicial judgment rather than objective indicators. *Coker v. Georgia*, 433 U.S. at 603 n.2 (Powell, J., concurring in part and dissenting in part).

¹⁷⁶ See *Furman v. Georgia*, 408 U.S. at 436-38 (Powell, J., dissenting) (arguing that the "legislative judgments of the people's chosen representatives" are the most significant "indicator of the public's attitude").

¹⁷⁷ *Id.* 439-40.

¹⁷⁸ *Id.* 438-39, 441 n.36. Justice Powell does not, however, consider public opinion polls to be a meaningful or relevant indicator of prevailing moral standards. *Id.* 441 n.36.

from what punishments are on the statute books, from the rate of imposition of given punishments and from public opinion polls.¹⁷⁹

The positive approach is also evident in the opinions of Justices White and Stewart, but it appears in conjunction with a normative approach applied as a separate test. They apparently believe that the "evolving standards of decency" maxim mandates the positive approach, but that the clause's meaning requires, as well, an application of inherent principles of cruelty to the punishment in question.¹⁸⁰ In his application of the positive approach Justice Stewart has viewed legislative enactments as the crucial indication of moral standards,¹⁸¹ while also citing referenda, jury behavior and opinion polls.¹⁸² Justice White has stressed legislative enactments, and also has made reference to jury behavior, referenda, opinion polls and state court decisions.¹⁸³

The trouble with the positive approach is that it reads the clause out of the Constitution. Any degree of reliance on public opinion polls, even if accompanied by disclaimers as to their weight, is improper in constitutional adjudication. Opinion polls, ironically, show that the majority of the public favors few of the pro-

¹⁷⁹ See *id.* 385-88 (Burger, C.J., dissenting). But cf. *Coker v. Georgia*, 433 U.S. at 614-15 (Burger, C.J., dissenting) (discounting the fact that only three states attempted to impose capital punishment for rape after *Furman*).

¹⁸⁰ See, e.g., *Gregg v. Georgia*, 428 U.S. at 173 (plurality opinion). After quoting the "evolving standards of decency" phrase, Justice Stewart continued:

Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. . . . [T]his assessment . . . requires . . . that we look to objective indicia that reflect the public attitude toward a given sanction.

But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with "the dignity of man"

Id.

In *Furman*, Justice Brennan also appeared to adopt a mixed positive/normative approach. He delineated four principles relevant to determining when a punishment violates the clause, the third of which focused on the standards of contemporary society as reflected by objective indicators such as jury behavior and legislative enactments. 408 U.S. at 277-79 (Brennan, J., concurring). The normative aspects of Justice Brennan's approach achieved dominance in his *Gregg* dissent, in which he relied exclusively on the dignity concept for his conclusion that the death penalty was unconstitutional. See 428 U.S. at 229-30 (Brennan, J., dissenting).

¹⁸¹ *Gregg v. Georgia*, 428 U.S. at 175-76, 179 (plurality opinion).

¹⁸² *Id.* 181.

¹⁸³ See *Roberts v. Louisiana*, 428 U.S. at 352-53 nn.5-6 (White, J., dissenting). See also *Coker v. Georgia*, 433 U.S. at 593-96 (plurality opinion). In *Coker* Justice White took notice of various objective criteria and applied them to the facts at hand. His analysis revealed that only three state legislatures had authorized death for the crime of rape, and that nine out of ten juries in the state had declined to impose the punishment. These facts were relevant to his conclusion that the sentence of death is a grossly disproportionate and excessive punishment for the crime of rape. See text accompanying note 261 *infra*.

tections embodied in the Bill of Rights.¹⁸⁴ This is not surprising; given that the purpose of the Bill of Rights is to protect certain rights of individuals from an overreaching majority.¹⁸⁵ Moreover, opinion polls are subject to methodological errors, and may record frivolous or ill-considered answers, or answers influenced by extrinsic factors.¹⁸⁶

Judicial reliance on referenda and legislative enactments as objective indicators of contemporary moral standards is a little more defensible than reliance upon opinion polls because these processes are the institutionally sanctioned methods of lawmaking in our society; therefore, they may have some degree of relevance in constitutional decisionmaking.¹⁸⁷ Nevertheless, conclusive reliance on these indicators either through substantive definition or extreme judicial deference is circular. Constitutional doctrine may not be formulated by the acts of those institutions which the Constitution is supposed to limit. To glean a list of permissible punishments from those enacted by legislatures either assumes that legislators never enact a punishment they think is, or may be, cruel or allows the legislature to define permissible punishments by its enactments. Such a view removes any role for a constitutional check. The circularity of this aspect of the positive approach has been recognized in other areas of constitutional adjudication. Referenda have been declared unconstitutional,¹⁸⁸ as have prohibitions or regulations sanctioned by many state legislatures.¹⁸⁹

¹⁸⁴ See, e.g., McCloskey, *Consensus and Ideology in American Politics*, 58 AM. POL. SCI. REV. 361 (1964); Prothro & Grigg, *Fundamental Principles of Democracy: Basis of Agreement and Disagreement*, 22 J. POL. 276 (1960). Cf. New York Times, April 16, 1970, at 37, col. 1 (random phone sample conducted by CBS reveals that the public favors limitation of five out of the ten amendments).

¹⁸⁵ See R. DWORKIN, *supra* note 117, at 192. The Bill of Rights may be regarded as an original compact that society will preserve certain rights regardless of current conditions. Naturally the compact will usually be invoked with reference to a particular right only when majority support for that right is thin. In a related vein, Dworkin has argued that constitutional rights are strong moral rights against the government such that the government should not violate them even if it thought that the majority's best interest would be served by doing so. *Id.*

¹⁸⁶ See, e.g., Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1264-66 (1974). See generally the essays in Parts III and V of CAPITAL PUNISHMENT IN THE UNITED STATES (H. Bedau & C. Pierce eds. 1976).

¹⁸⁷ For example, they may affect the applicable standard of review. See text accompanying notes 145-46 *supra*.

¹⁸⁸ See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (article of state constitution approved by referendum violates equal protection).

¹⁸⁹ For example, many states had "separate but equal" education provisions which were invalidated by *Brown v. Board of Educ.*, 347 U.S. 483 (1954); many states had anti-abortion statutes which were invalidated by *Roe v. Wade*, 410 U.S. 113 (1973); and many school boards had mandatory flag salutes which were invalidated by *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

The problems attendant on the use of legislative enactments as an indicator of the public conception of morality became obvious in *Woodson v. North Carolina*.¹⁹⁰ Although the three Justices in the *Gregg* plurality cited the enactment of mandatory death penalty statutes as evidence of current moral standards on capital punishment in general,¹⁹¹ in *Woodson* they declined to consider these statutes as evidence of the public's moral acceptance of mandatory death sentences for murder. Justice Stewart argued:

[I]t seems evident that the post-*Furman* enactments reflect attempts by the states to retain the death penalty in a form consistent with the constitution, rather than a renewed societal acceptance of mandatory death sentencing. The fact that some states have adopted mandatory measures following *Furman* while others have legislated standards to guide jury discretion appears attributable to diverse readings of this Court's multi-opinioned decision in that case.¹⁹²

If Justice Stewart's argument was that some states enacted mandatory statutes even though they offended current standards of decency, he cannot have simultaneously contended that standards of decency are *defined* by legislative enactments. If his argument was that the boundaries of decency can generally be presumed from the existence of legislative enactments, but not in *this* case, then he has presented at least one occasion in which legislators have transgressed current moral standards. Furthermore, if Justice Stewart meant that the Court can assume that legislators will not ordinarily violate current moral standards absent special circumstances, then the Court ought to develop criteria for determining when those circumstances are present. The need for judge-made criteria to determine when legislative enactments express a moral consensus and when they do not, however, undermines the assumption of the positive approach that objective indicators define the current standards of decency.

The examination of jury behavior as an indicator of contemporary moral standards is not so obviously vulnerable to criticism. At least those who serve on juries have been solemnly charged to bring their best moral judgment to bear on the cases

¹⁹⁰ 428 U.S. 280 (1976).

¹⁹¹ *Gregg v. Georgia*, 428 U.S. at 180-81.

¹⁹² 428 U.S. at 298-99 (footnotes omitted).

brought before them.¹⁹³ Juries are the traditional expositors of the community moral consensus. The difficulty with this indicator is that the frequency of jury imposition of an authorized penalty cannot provide unequivocal evidence of the moral consensus regarding its cruelty. First, jurors may decide to be cruel on occasion; they are not instructed that they must not be. Given that the Framers thought it necessary to protect individuals from being cruelly punished, it makes more sense to suppose that some juries, judges and legislators will decide to be cruel than to assume that they all will try not to be. Justice Rehnquist derided the plurality in *Woodson* for trying to "save the people from themselves,"¹⁹⁴ but Justice Marshall would probably find that idea quite proper. The clause, he has said, exists as "insulation from our baser selves,"¹⁹⁵ because a free society is not afraid to recognize and guard against its inherent weaknesses, among them being the occasional temptation to cruelty. Second, unless the consensus on cruelty is so complete that no jury ever imposes a particular penalty, one cannot determine whether a low rate of imposition indicates that juries think the penalty is cruel or that juries reserve the penalty for those rare heinous crimes for which they think it is not cruel. Similarly, one cannot tell whether a high rate of imposition means juries think the penalty is morally acceptable, or simply that they have been cruel.

State court decisions are also not so obviously vulnerable as an indicator. Consider, however, that state court judges are supposed to determine moral standards under the eighth amendment in the same fashion as the Supreme Court. Hence, if state courts are divided on whether or not the death penalty is unconstitutionally cruel,¹⁹⁶ one of two things must be true. Either the death penalty

¹⁹³ The significance of this charge is minimized, however, in the case of the death penalty. Jury behavior in capital cases is distorted because of the historical practice of disqualifying jurors whose moral beliefs were inconsistent with the imposition of death. This practice was found violative of the sixth and fourteenth amendments by the Court and discontinued only relatively recently. *Witherspoon v. United States*, 391 U.S. 510 (1968). See *Davis v. Georgia*, 429 U.S. 122 (1976), discussed at note 48 *supra*.

¹⁹⁴ *Woodson v. North Carolina*, 428 U.S. at 313 (Rehnquist, J., dissenting).

¹⁹⁵ *Furman v. Georgia*, 408 U.S. at 345 (Marshall, J., concurring).

¹⁹⁶ Twenty-six state courts considered the constitutionality of death penalty laws prior to *Furman*; only one struck down a state statute. *Furman v. Georgia*, 408 U.S. at 442 n.37 (Powell, J., dissenting). See *People v. Anderson*, 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880, *cert. denied*, 406 U.S. 958 (1972) (striking down California death penalty statute as a violation of the state constitution's prohibition of "cruel or unusual" punishments). The *Anderson* decision was "overruled" by a statewide referendum in 1972. See *Rockwell v. Superior Court*, 18 Cal. 3d 420, 434 n.1, 134 Cal. Rptr. 650, 666 n.1, 556 P.2d 1101, 1103 n.1 (1976). After *Furman*, the Massachusetts Supreme Judicial Court found execution to be

is cruel in some states and not in others, or some of the state courts are wrong. If some state courts are wrong, the Supreme Court must decide which, and it cannot cite state court decisions as evidence of the appropriate standard of cruelty by which it must do this. If the death penalty is cruel in some states and not in others, then undertaking the moral consensus inquiry on a national scale, as the Supreme Court has done, is improper. Further, if the moral consensus inquiry should proceed on a state by state basis,¹⁹⁷ then each state court must be presumed to be right about the moral consensus on cruelty in its state, and there is no role for Supreme Court review. If there is to be a role for review, then, although weight may be given to state court decisions, they cannot be utilized to determine the applicable substantive standard the Supreme Court must apply.

2. The Normative Approach

Justice Marshall has not taken the positive approach to ascertaining current moral standards through objective indicators. Rather than focusing on the surface perceptions of the populace's views regarding various aspects of cruelty, Marshall has attempted to assess the deeply-held principles of the public, and has hypothesized about their underlying sentiment toward specific punishments. He explained in *Furman*, and repeated in *Gregg*, that "whether or not a punishment is cruel and unusual depends, not on whether its mere mention 'shocks the conscience and sense of justice of the people,' but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable."¹⁹⁸ He believes that an informed citizenry *would* find the death penalty morally unacceptable because it is "unwise," and because he "cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance."¹⁹⁹ The factors Marshall thinks would cause informed citizens to find the death penalty "unwise" are:

unconstitutional under its state constitution. *Commonwealth v. O'Neal*, — Mass. —, 339 N.E.2d 676 (1975).

¹⁹⁷ A state by state approach has been proposed by Polsby, *supra* note 33, at 28-29. There are vexing problems in determining "community" moral standards, however, as the Court's struggle with the obscenity issue has demonstrated. See, e.g., *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

¹⁹⁸ *Gregg v. Georgia*, 428 U.S. at 232 (Marshall, J., dissenting); *Furman v. Georgia*, 408 U.S. at 361 (Marshall, J., concurring).

¹⁹⁹ *Furman v. Georgia*, 408 U.S. at 363.

that the death penalty is no more effective a deterrent than life imprisonment, that convicted murderers are rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become law-abiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity.²⁰⁰

Marshall has also noted that the death penalty is imposed discriminatorily; that innocent people sometimes have been executed; and that "the death penalty wreaks havoc with our entire criminal justice system."²⁰¹

Because Justice Marshall refers to what informed citizens *would* think, his position initially seems vulnerable to the criticism that he is substituting his own opinion of what people *should* think for what they, in fact, *do* think. It also might be thought to imply that courts could rely on opinion polls if the polls "inform" people before asking them their opinion on a punishment.²⁰²

Despite these criticisms, Justice Marshall's *Furman* opinion is suggestive of a more satisfactory way of appealing to prevailing moral conceptions than the "positive approach" epitomized by Justices Burger and Powell. Marshall assumes that the populace is at least rational enough to conform its judgments to information on the realities of the death penalty as applied. In defense of Justice Marshall, this does not necessarily substitute for popular opinion the opinion of the judge. The judge may hold different views than those of such an informed populace. But in assuming such judgments in conformity to available information, the judge is requiring a certain minimal rationality on the part of the populace before its views are to be taken seriously, and this is a normative requirement. Such a requirement might be justified on the grounds

²⁰⁰ *Id.* 362-63.

²⁰¹ *Id.* 364.

²⁰² See Sarat & Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 Wis. L. REV. 161, 196. After providing survey subjects with relevant information about the death penalty and its effects, these authors found decreased support for the death penalty. These empirical results provided some support for Justice Marshall's view that "informed" citizens would reject the death penalty to the extent that their responses were not based on retribution.

of respect for each citizen's rational capacity, regardless of whether such rationality is always exercised. But if this much rationality may justifiably be required of the populace, it is difficult to see why a more general coherence of moral views may not similarly be required. This leads to the idea that the prevailing moral judgment of the populace regarding a given punishment may be properly spoken of as moral consensus, and may properly shape a court's decisions, only when that judgment can be inferred to be part of a coherent moral position for each individual who holds it. A coherent position is reached when an individual's views on the acceptability of a punishment are consistent with her central, deeply held moral positions.²⁰³ One arrives at a coherent moral position by an ongoing process weighing each moral judgment one holds against all of the others and making adjustments in order to preserve consistency with the intuitions and principles deemed most basic.²⁰⁴ For instance, a person may initially believe in both the absolute sanctity of human life and the idea that death is an appropriate punishment for grievous crimes. In a coherent moral position, however, either the sanctity of life principle will have to be relinquished or modified (perhaps to exclude the lives of people who have taken the life of another) or the idea that death is a permissible punishment will have to be abandoned. Which way the reconciliation proceeds depends upon which idea the person more centrally or deeply holds; this balance in turn depends on the relationship of these ideas to the person's other moral convictions. The reason it is often suggested that one ought to look to what people do rather than what they say, or even more pointedly, that those who favor the death penalty should be asked whether they would be willing to pull the switch themselves, is that a person is more likely to have reached a coherent moral position if she is going to be required to transform her beliefs into action.

There is no sort of opinion poll that can determine what people would think is cruel had they gone through the process of arriving at a coherent moral position. The judge, therefore, must utilize central moral concepts of our system on which there is a consensus to infer what a coherent position would be with respect

²⁰³ See generally R. DWORKIN, *supra* note 117, at 248-53 (outlining the notion of a moral position and distinguishing it from other reasoning processes such as rationalization, prejudice, emotionalism, and parroting).

²⁰⁴ The notion of a coherent moral position is essentially the same as Rawls' concept of reflective equilibrium. See J. RAWLS, *supra* note 121, at 20, 48-51. The coherence theory and its use as a method of ethical argument has been outlined by Joel Feinberg. See Feinberg, *Justice, Fairness, and Rationality*, 81 YALE L.J. 1004, 1018-21 (1972) (reviewing A *Theory of Justice*).

to the acceptability of any given punishment. Under this normative approach to determining current moral consensus, a judge does not necessarily rely on her own position, even though it would often be the same as that inferred from central moral concepts.²⁰⁵ Justice Marshall can safely infer that the public's moral position on the death penalty would be influenced by the knowledge that many innocent people have been executed. This follows from the existence of a clear societal consensus that it is wrong to kill an innocent person.

The application of moral coherence analysis to a given punishment involves at least two aspects. First, a court can look to relevant moral ideas in our society for guidance (for example, "it is wrong to kill an innocent person"). This includes looking to relevant moral ideas in other areas of the law. The general tendency of the law to consider life sacred²⁰⁶ and to protect individuals from forcible bodily invasions would be relevant to the determination of whether a sentence of death for rape is cruel and unusual. Second, the court can focus on cruelty, the moral concept in question; it can take judicial notice of or evidence on general principles of cruelty and the compatibility of these principles with the punishment at hand. This process of delineating a collective coherent position on a moral concept, with an eye toward a particular governmental act²⁰⁷ enables the Court to decide—in fact, is the process of deciding—whether the governmental act falls within the boundaries delineated by that position.

C. Principles of Cruelty

In order to decide cruel and unusual punishment claims on the basis of a collective coherent position, a court must be able to identify principles of cruelty capable of generating additions to the list of known cruelties. Therefore, and leaving aside for now what special considerations may obtain when applying the word to punishment, as well as whether "cruelty" has a different meaning in the context of governmental or societal actions than for those of a

²⁰⁵ See R. DWORKIN, *supra* note 117, at 126-29.

²⁰⁶ See, e.g., Kadish, *Respect for Life and Respect for Rights in the Criminal Law*, 64 CALIF. L. REV. 871 (1976). Dean Kadish's analysis reveals that there is no one general principle governing the sanctity of life in the law. He does identify, however, several circumstances in which other societal values are given priority over the law's protection of life.

²⁰⁷ If a court cannot identify a collective coherent position, it should seek the collective consensus position regarding the appropriate direction for the court to proceed in the face of moral uncertainty. See text accompanying notes 279-80 *infra*.

person,²⁰⁸ it is necessary to inquire what kinds of individual acts are cruel.

The essence of cruelty appears to be the gratuitous infliction of suffering—that is, the infliction of physical or mental pain without good reason. If the motivation of an act is reprehensible because the inflicter enjoys seeing people suffer, or knows there is no good reason for inflicting the pain, one can be more certain the act is cruel. In fact, under these circumstances one may be more inclined to say that the inflicter is a cruel person as well as that the act is cruel. The element of bad motivation, however, is not always necessary to cruelty. The act of beating a child so severely as to inflict serious injury would be considered cruel even if the inflicter believed the beating was beneficial to the child's welfare. In contrast to this example, there may also be invasions of individual interests which would not be considered cruel absent some element of impermissible motivation.

A second characteristic of cruelty is hardness or lack of concern or sympathy for human individuals. This element of cruelty also is related to motivation. To degrade a person is to be cruel to her; to be cruel is also to degrade oneself because one who is cruel will be considered "inhuman" by her fellow humans.²⁰⁹

The preceding discussion of the characteristics of "cruel" acts illustrates the two main elements of cruelty which must be evaluated in judging the constitutionality of punishments. First, drawing from the discussion of degrading acts, a cruel act is one which violates individual and collective human dignity. Second, drawing from the discussion of the infliction of pain without good

²⁰⁸ Members of the Court have said that the word "cruel" as applied to punishments in the eighth amendment is not to be understood in the abstract.

To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

Robinson v. California, 370 U.S. 660, 667 (1961). Nor is "cruel" to be understood in the dictionary sense.

The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve.

Furman v. Georgia, 408 U.S. at 312 (White, J., concurring).

²⁰⁹ The existence of the concept of cruelty to animals suggests that cruelty involves a lack of sympathy not just for all human beings, but for all sentient beings. This breadth of the concept need not trouble us here. Yet it is relevant to notice that even though an animal is not the same kind of morally significant being as a human being, a person who unnecessarily inflicts pain on an animal is generally thought to degrade both herself and all humanity.

reason, a cruel act is one which is excessive. These two principles merit closer examination and comparison.

1. Dignity

The element of human dignity is a necessary part of any moral conception of cruelty, as can be demonstrated by everyday experience. For example, it is cruel to make a laughing stock of someone or to expose shameful personal information about a person to the public or a peer group merely for the sake of seeing her squirm. On the other hand, it would not necessarily be cruel to laugh at the same person in private or to mention humiliating information in closed conversation, even though to do so might also cause pain. The distinguishing factor in these two situations is that the demand of dignity vis-à-vis one's fellows is more clearly present in the former. The dignity element of cruelty is bottomed on a moral obligation of each person to treat others as persons, with the kind of equal concern and respect that we call "human" or "humane." This felt moral obligation is intensified when persons are in the presence of other members of the human community because the transgression of dignity in the presence of others makes it obvious that the injured person is valued less than a person ought to be valued.

Torture, the primary core case under the cruel and unusual punishments clause, appears to be proscribed primarily because it is inconsistent with the principle of dignity. There are punishments that are too degrading (both to the victim and to the inflicter) to be tolerated. The crux of governmental or societal cruelty is action toward citizens with such a lack of concern and respect as to degrade them and their significance as human persons. Under this definition it is appropriate to consider a repressive or totalitarian government cruel. A person subjected to torture is degraded and treated as a non-person; she may in fact become a non-person in the sense that she may lose those values, characteristics and responses we associate with personhood.

Although the infliction of extreme and prolonged pain may constitute the core meaning of degradation in this context, acts lower on the pain scale, such as being pilloried, can be sufficiently degrading so as to fall within this category of cruelty. Some governmental actions may involve little physical pain, but by cutting an individual off from the human community, may be nonetheless degrading. As a result, a punishment involving no physical pain

at all, denationalization, has been assimilated into the dignity aspect of cruelty because it foreclosed "the right to have rights."²¹⁰ Justice Brennan has focused on this principle of cruelty and concluded that the fundamental standard for evaluating punishments under the cruel and unusual punishments clause is "the dignity of man."²¹¹ Referring to classic tortures, he said:

The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the clause that even the vilest criminal remains a human being possessed of common human dignity.²¹²

2. Excessiveness

The basic understanding of a cruel act as one that gratuitously inflicts suffering, or inflicts suffering without good reason, generates another major principle of cruelty, excessiveness. Behind this principle is the idea that there is enough pain in the world, and, hence, it is "inhuman" to increase it more than is necessary. This element of cruelty overlaps in large part with the dignity principle, because to inflict gratuitous suffering on an individual is to fail to treat that individual as a person, worthy of equal concern and respect.

The excessiveness principle is particularly germane to punishment cases within Types 2 and 3 involving proportionality and power to criminalize.²¹³ It is gratuitous to punish someone for behavior that is not punishable; it is excessive to punish someone more severely than her crime warrants. Justice Marshall has quoted Justice Field for the proposition that "[t]he entire thrust of the Eighth Amendment is, in short, against 'that which is excessive'," noting that the rest of the amendment prohibits excessive bail and excessive fines.²¹⁴

This excessiveness strand of cruelty was utilized by Justice Stewart speaking for the plurality in *Gregg*,²¹⁵ but came to the

²¹⁰ *Trop v. Dulles*, 356 U.S. 86, 102 (1958). The use of denationalization as a punishment for military desertion was viewed as dehumanizing by the Court because it destroyed the individual's status in organized society and subjected him to constant discrimination. *Id.* 101-02.

²¹¹ *Furman v. Georgia*, 408 U.S. at 270 (Brennan, J., concurring).

²¹² *Id.* 272-73.

²¹³ See text accompanying notes 13-18 *supra*.

²¹⁴ *Furman v. Georgia*, 408 U.S. at 332 (Marshall, J., concurring) (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)).

²¹⁵ Justice Stewart noted: "[T]he inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of

forefront of eighth amendment adjudication in *Coker v. Georgia*. The *Coker* Court used a two-pronged excessiveness test, holding that execution for the crime of rape was excessive and therefore unconstitutional.²¹⁶

3. Are Dignity and Excessiveness Discrete Principles?

Although excessive punishment seems to be degrading to human dignity,²¹⁷ and the two principles apparently overlap to a great extent, they may not be coextensive.²¹⁸ There are differences in the emphasis of each principle which in the context of the cruel and unusual punishments clause may usefully be thought of as reflecting divergent justifications for punishment. The excessiveness criterion is formulated as related inversely to what is thought reasonable or necessary, while the dignity criterion is formulated independent of these considerations. As a result, there may be non-excessive punishments that infringe human dignity, depending on one's philosophical mode of justification for punishment.

One mode of justification (utilitarianism) has the result that punishment must be limited by the societal benefits it produces, while another (retributivism) has the result that punishment must be limited by the extent to which a person deserves to suffer an official sanction. If one accepts the utilitarian justification, punishments violative of the dignity principle may be non-excessive to the extent they further a legitimate social objective in the most economical way. For example, suppose it can be shown that the only way to deter some particularly heinous crimes, such as terrorist bombings, is public torture of those perpetrators who are captured. Torture in such a case would be acceptable under a utilitarian theory of the excessiveness principle, because it would be necessary to the achievement of a permissible goal of punishment. Nevertheless, torture is not acceptable under the cruel and unusual punishments clause, and

pain. . . . Second, the punishment must not be grossly out of proportion to the severity of the crime. . . ." *Gregg v. Georgia*, 428 U.S. at 173 (plurality opinion) (citations omitted).

²¹⁶ 433 U.S. at 592. The two-pronged excessiveness test is further discussed at text accompanying notes 244-72 *infra*.

²¹⁷ "A penalty . . . must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' . . . This means, at least, that the punishment not be 'excessive.' . . ." *Gregg v. Georgia*, 428 U.S. at 173 (plurality opinion) (citation omitted).

²¹⁸ But see Wheeler, *supra* note 8, at 853-55; Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia*, 25 STAN. L. REV. 62, 68 (1972). In both articles Wheeler argues that proportionality is the crucial principle of the cruel and unusual punishments clause and coextensive with the dignity principle.

to this extent the utilitarian theory of justification has been foreclosed by the Framers.²¹⁹

In contrast to the utilitarian theory, punishment imposed upon an individual under retributivist or "just deserts" standards²²⁰ cannot be non-excessive and still violate the principle of human dignity. The underlying principle of retributivism is that criminals must receive their "just deserts" because they, like all human individuals, must be treated as ends rather than as means. Treatment of persons as ends rather than means is required because of the inherent dignity and worth of all persons.²²¹ Thus it appears that retributivist systems define dignity coextensively with permissible punishment, with the result that all violations of human dignity are inherently excessive.

D. *The Excessiveness Principle and the Justification of Punishment*

The foregoing sections of this Article have urged a normative approach to the problem of ascertaining a moral consensus on the propriety of punishment based on contemporary principles of cruelty. One of these principles is that punishment should not be excessive, and in *Coker*, the Supreme Court developed a two-pronged excessiveness test for whether punishments are cruel under

²¹⁹ See generally R. DWORKIN, *supra* note 117, at 193; Dworkin's theory of rights maintains that the function of constitutional rights in general is to forbid utilitarianism as a justification for infringements of certain personal interests.

²²⁰ See text accompanying note 231 *infra*.

²²¹ This formulation stems from the writings of Immanuel Kant, who maintained that each person has absolute value by virtue of existence as a rational being, and hence cannot be used as an instrumentality to promote the ends of others. "[R]ational beings . . . are called *persons*, because their very nature points them out as ends in themselves, that is, as something which must not be used merely as means, and so far therefore restricts freedom of action (and is an object of respect)." I. KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS* (1785), reprinted in *THE ESSENTIAL KANT* 294, 330 (T. Abbott & A. Zweig trans. 1970). Applying his principles to the practice of punishment, Kant wrote:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens.

I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (J. Ladd trans. 1965) (1st ed. 1797).

For some thoughts of a modern retributivist on the right to be treated as a person, see Morris, *supra* note 125. For explorations of the notion of "treatment as a person" in general, see P.F. STRAWSON, *Freedom and Resentment*, in *FREEDOM AND RESENTMENT* 1-25 (1974); Benn, *Privacy, Freedom and Respect for Persons*, 13 *NOMOS* 1 (1971).

the eighth amendment. This section will demonstrate that the *Coker* plurality test comes close to the Hart/Packer mixed approach to the justification of punishment²²² (which Justice Marshall may have implicitly accepted as well²²³), without attempting a unifying rationale for the two prongs. It will be concluded here that the mixed approach is an acceptable method of analysis, requiring both utilitarian and retributivist judgments to be made with respect to the constitutionality of a challenged punishment.

1. Excessiveness and Least Restrictive Means

Use of the excessiveness standard has the effect of forcing judges to articulate the proper justifications for punishment, and its logic requires some sort of least restrictive means analysis. Any punishment beyond the minimum necessary to accomplish justifiable ends is excessive, and involves the gratuitous infliction of suffering,²²⁴ unless "excessive" is not to be given its common-sense meaning. But the common-sense meaning embodies our moral insight on cruelty, and deviation from it would have to be justified. If "excessive" is to be a word of art in the punishment context, it might be defined such that while punishment X will satisfy the permissible ends of punishment, punishment X + Y is also justifiable ("non-excessive") given the presence of uncertainty. The "permissible ends of punishment" encompass all of the reasons the government

²²² See text accompanying notes 235-37 *infra*.

²²³ See note 243 *infra*.

²²⁴ See text accompanying notes 213-16 *supra*. It is worth noting, incidentally, that, because of the relationship of excessiveness to the justifications of punishment, the "gratuitous infliction of suffering" may not exhaust the category of excessiveness. A person may suffer less, in some sense, if put to death than if kept in prison for life, but the death penalty would still be excessive if it were a greater penalty than necessary to serve whatever purposes are found to be appropriate. Another way to look at this problem, however, is to say that in such a situation it would be cruel—gratuitous infliction of suffering—not to allow a convicted person to choose to be put to death rather than imprisoned. See note 156 *supra*. A related problem was raised in *Gilmore v. Utah*, 429 U.S. 1012 (1976), in which the Court upheld defendant *Gilmore's* waiver of any right to challenge Utah's death penalty statute. The waiver was essentially a choice to be executed. Justices White, Brennan and Marshall dissented, stating that "the consent of a convicted defendant . . . does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment." *Id.* 1018 (White, J., dissenting). Justice Marshall, in a separate dissent, added:

I believe that the Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but that it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments.

Id. 1019 (Marshall, J., dissenting). Justice Blackmun, who wrote a separate dissent, would have given the *Gilmore* case plenary consideration, given his perception that the issues involved were of a substantial nature. *Id.* 1020 (Blackmun, J., dissenting).

may give to morally justify invasion of personal rights in order to punish. Any incremental punishment above that which is necessary to accomplish these ends would have to be justified by an error or uncertainty principle: that is, if the government cannot tell whether X is sufficient or $X + Y$ is, in fact, necessary, then $X + Y$ is permissible. In order for this justification to be valid, however, the decision to risk error in favor of the government rather than in favor of the individual would have to be justified. The more the punishment invaded fundamental individual interests, the harder it would be to justify such deference.²²⁵

Justice Marshall has explicitly recognized that the excessiveness standard mandates least restrictive means analysis,²²⁶ but other Justices have attempted to avoid this conclusion, possibly to avoid placing the burden of persuasion as to least restrictive means on the states. Allocation of the burden, however, has nothing to do with the choice of standard for what constitutes excessiveness.²²⁷ If excessiveness is the standard, then at least the petitioner ought to be permitted to show that the punishment is excessive; that is, that all permissible goals of punishment might just as well be accomplished with a lesser punishment. In some, but not all, cases, the factors relevant to risk of error dictate that the burden be placed upon the government to show its punishment is not excessive.²²⁸

2. Utilitarianism, Retributivism, and Mixed Approaches

What then are the permissible goals of punishment? In this discussion, the two justifications which have been most often proffered, utilitarianism and retributivism, will be examined.²²⁹

The utilitarian (teleological) justification for punishment is prospective and collectivist: it depends on the benefit to society to be gained by punishing someone.²³⁰ The retributivist (deontological) justification for punishment is retrospective and individualist:

²²⁵ See text accompanying notes 132-50 *supra*.

²²⁶ See text accompanying notes 77-79 *supra*.

²²⁷ See text accompanying notes 103-07 *supra*.

²²⁸ See text accompanying notes 151-59 *supra*.

²²⁹ See generally H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35-61 (1968); note 153 *supra*.

²³⁰ The societal benefits are generally assumed to be the deterrence of the punished person from committing further crimes (special deterrence) and the deterrence of others from committing crimes (general deterrence). *Id.* 39-48. Jeremy Bentham is the father of utilitarian punishment theory. See 2 J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 1-55 (rev. ed. 1823).

it depends on what the punished person deserves in light of her past acts.²³¹

Historically, utilitarian justifications for punishment were put forward to limit retributivism.²³² Utilitarians argued that it would be barbaric to inflict punishment only for the sake of vengeance when no social good could result, and eventually utilitarianism replaced retributivism as the reigning "humane" justification of punishment.²³³ Today we have come full circle: retributivist justifications for punishment are being put forward to limit utilitarianism. Modern retributivists argue that the "humane" treatment of persons (that is, treatment founded upon the basic right to equal concern and respect) is best accomplished in a system that focuses only on what a transgressor deserves for breaking the social compact, thereby taking advantage of others who did not, rather than on what society is likely to gain by punishment.²³⁴

There is a popular "mixed" approach to the justification of punishment, most often associated with H.L.A. Hart²³⁵ and Herbert Packer,²³⁶ but which was originally adumbrated by John Rawls,²³⁷ holding that punishment, as a general practice, may be justified teleologically, but that the application of punishment to specific individuals may be justified deontologically. Even this view is vulnerable to criticism by modern retributivists, however, because if each person may be punished only insofar as she deserves it, but the general aim of punishment is utilitarian deterrence, then under the mixed approach only those "deserving" people whose punishment serves social purposes should be punished. To this extent, a retributivist would say people are still being used as a means, not ends. In addition, the mixed approach contains the troublesome implication that "deserving" people whose punishment

²³¹ Retributivism is at least as old as the maxim, "An eye for an eye." The formulation of retributivism as a theory of just punishment is attributable to Immanuel Kant. See note 221 *supra*.

²³² "Historically [utilitarianism] is a protest against the indiscriminate and ineffective use of the criminal law. [It] seeks to dissuade us from assigning to penal institutions the improper . . . task of matching suffering with moral turpitude." Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 7-8 (1955).

²³³ Justice Marshall, who thinks retribution is a goal states may not pursue as the sole justification for the death penalty, exemplifies this strand of "humane" thinking. See note 78 *supra*.

²³⁴ See, e.g., Morris, *supra* note 125. Jeffrie Murphy has argued that this reasoning constitutes a moral justification of punishment only if the social compact is not a fictional construct but an actual social consensus. Murphy, *Marxism and Retribution*, 2 *PHIL. & PUB. AFF.* 217, 243 (1973).

²³⁵ H.L.A. HART, *supra* note 18, at 1-28.

²³⁶ H. PACKER, *supra* note 229.

²³⁷ Rawls, *supra* note 232.

would not contribute to deterrence (if there are any) ought not to be punished.

My own view is that there probably is no meta-principle that can completely reconcile the two theories of justification. There are uncertainty principles in many areas of philosophical and scientific inquiry; it should not be surprising to find that uncertainty exists in moral philosophy. The source of this uncertainty is the paradoxical nature of human self-perception—the perception of one's self as profoundly an individual, and profoundly part of a collectivity. The concept of a human individual absent the existence of and interaction with others makes no sense to us.²³⁸ Because each of us is profoundly part of a collectivity,²³⁹ duties and obligations that intrude upon otherwise permissible individual expectations can be justified in certain circumstances as necessary to the maximization of the general welfare. At the same time, the profound individuality of each of us compels accepting the notion that each person has a right not to be "used" for the benefit of others.²⁴⁰ The split between the individual and collective modes of perception has appeared at all levels of human endeavor. Some intellectual eras, some governments, some people, and some parts of each person's personality stress the individualist mode and some the collective. Each point of view functions as a check on the other, just as historically the retributivist and utilitarian justifications for

²³⁸ Because the concept of an individual person can only be completely understood with reference to a context of the human collectivity, it follows *a fortiori* that human moral capacity and moral judgments can only be understood by reference to individual membership in the collectivity. See S. TOULMIN, *AN EXAMINATION OF THE PLACE OF REASON IN ETHICS*, ch. 11 (1950); cf. T. NAGEL, *THE POSSIBILITY OF ALTRUISM*, ch. 11 (1970) (refuting solipsism, the metaphysical and epistemological theory that denies the possibility of knowing the existence of others). Thus, in making moral arguments, the concept of the individual in theories emphasizing individual rights and interests, though of central usefulness and power, cannot be pushed so far that one loses sight of the context within which individuality has meaning. The individual in a vacuum is a theoretical construct like the social contract. Such constructs or theories are like flat maps of the world: very accurate at the point of focus but quite distorted at the edges. The individual/society construct is very useful in a variety of contexts but not in all; the justification of criminal punishment is one of those contexts in which the distinction breaks down.

²³⁹ A succinct expression of the collective mode is contained in John Donne's *Devotion XVII*: "No man is an island, entire of itself; every man is a piece of the continent, a part of the main . . . [A]ny man's death diminishes me, because I am involved in mankind . . ." J. DONNE, *DEVOTIONS* (London, 1624). As noted above, see note 238 *supra*, it is relied on in some moral theories; Hilary Putnam relies on it in developing a theory of semantics, see H. PUTNAM, *MIND, LANGUAGE AND REALITY* 215-71 (1975).

²⁴⁰ This idea was quintessentially expressed by Kant, see note 221 *supra*, and has been bequeathed to rights theorists such as Nozick and Dworkin. See R. DWORKIN, *supra* note 117; R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

punishment have not become reconciled but rather have reached shifting truces.²⁴¹

In the criminal punishment area, perhaps the Hart/Packer mixed position is a truce we can live with, in spite of the force of modern retributivist criticism.²⁴² More significantly, from a practical standpoint, at least five members of the current Supreme Court (the plurality of four in *Coker*, plus Justice Marshall²⁴³) seem implicitly to have adopted either this mixed position or a dual position without a unifying rationale.

3. The *Coker* Two-Pronged Excessiveness Test and Its Implications

In *Coker*,²⁴⁴ Justice White, joined by Justices Stewart, Blackmun and Stevens, held a punishment to be excessive and violative of the cruel and unusual punishments clause "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."²⁴⁵ Using the second excessiveness standard,

²⁴¹ This sketch of the function of utilitarian and retributivist tendencies in justification of punishment is somewhat analogous to Duncan Kennedy's conception of a split between individualism and altruism in private law. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

²⁴² See text accompanying notes 237-38 *supra*. In light of that criticism, further examination of the question whether the mixed position does in fact underdetermine the class of persons we feel ought to be punished is warranted. To be complete, the Hart/Packer model also needs to take into account the phenomenon described below as "revenge-utilitarianism." See text accompanying notes 250-53 *infra*.

²⁴³ Although Justice Marshall has found retributivism to be an insufficient moral and constitutional justification for punishment, see notes 78 & 233 *supra*, he apparently meant only to reject pure retributivism. The following passage from his dissent in *Gregg* indicates his acceptance of the mixed view:

The concept of retribution is a multifaceted one, and any discussion of its role in the criminal law must be undertaken with caution. On one level, it can be said that the notion of retribution or reprobation is the basis of our insistence that only those who have broken the law be punished, and in this sense the notion is quite obviously central to a just system of criminal sanctions. But our recognition that retribution plays a crucial role in determining who may be punished by no means requires approval of retribution as a general justification for punishment.

428 U.S. at 237 (Marshall, J., dissenting) (footnote omitted). In a note following the quoted passage Justice Marshall cited the works of Hart and Packer as support for his views. *Id.* 237 n.15.

²⁴⁴ *Coker v. Georgia*, 433 U.S. 584 (1977). See text accompanying notes 1-7, 48-49 *supra*.

²⁴⁵ *Id.* 592. This test is a refinement of Justice Stewart's two-pronged treatment of excessiveness adopted by the plurality in *Gregg v. Georgia*, see note 215 *supra*. The language that would invalidate a punishment under the first excessiveness standard when it "makes no measurable contribution to acceptable goals of punishment" is new in the *Coker* formulation.

Justice White found death at the hands of the state to be grossly disproportionate to the crime of rape.

Before considering how a court should decide whether a punishment is disproportionate to a crime, let us consider the relationship of these two standards in light of the utilitarian and retributivist theories of punishment. In the first place, if one is a retributivist, then the proportionality standard and the first standard coalesce, because a punishment is disproportionate to a crime if its sanctions are more severe than the criminal deserves.²⁴⁶ Because retributivists argue that the only acceptable justification of punishment is that criminals deserve it, punishing disproportionately would serve no acceptable goal of punishment. On the other hand, if one is a pure utilitarian the two standards also coalesce, because a punishment is disproportionate to a crime if the social benefit of deterrence gained from it is less than the social harm caused by the pain it inflicts. Because utilitarians argue that the only acceptable goal of punishment is achieving a net social benefit, a punishment that results in a net social loss serves no acceptable goal.²⁴⁷ It is clear, then, that the *Coker* plurality's two excessiveness standards are distinct only if one adopts the Hart/Packer mixed view, or a dualist view with no reconciling rationale. Interpreted in light of either view, the first part of the *Coker* test requires that punishments result in a net social gain, and the second part functions as a limitation on particular punishments that may serve utilitarian ends, but violate the element of human dignity inherent in retributivism.²⁴⁸

This does not mean that any member of the Court has explicitly made the connection between the dignity element of cruelty and pure retributivism. Quite the contrary, Justice Marshall has found that punishments imposed to serve the purposes of retribution alone are constitutionally prohibited.²⁴⁹ In coming to this con-

²⁴⁶ See text accompanying notes 220-21 *supra*.

²⁴⁷ See text accompanying notes 218-19 *supra*.

²⁴⁸ See text accompanying note 219 *supra*. Herbert Packer, prior to his formulation of the mixed view in *H. PACKER, supra* note 229, sought to demonstrate that the proportionality limitation becomes much more difficult for courts to apply if retributivism is ruled out as a proper justification of punishment. To illustrate his point that reliance solely on a utilitarian rationale—as many liberal thinkers at the time purported to do—could lead to insupportable results, Packer used *reductio ad absurdum* style arguments that utilitarianism would support the execution of violent psychopaths or rapists as a class. See Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1078-81 (1964). In his *Coker* dissent, Chief Justice Burger cited these arguments in support of his conclusion that the execution of rapists is in fact justifiable. 433 U.S. at 610 n.5 (Burger, C.J., dissenting).

²⁴⁹ See note 78 *supra*.

clusion he perhaps assumed that retributivism may dictate that a person can sometimes deserve a punishment that would violate the dignity standard, that is, a punishment within the core cases of the clause. Classical retributivism (an eye for an eye *lex talionis*) may have supported such a view, but dignity, like cruelty, is a moral concept that evolves, and conceptions of dignity change over time. Because the value underlying modern retributivism is to treat people with the concern and respect due persons, a punishment that violated our current conception of human dignity could not be justified on retributivist grounds.

Perhaps another explanation of Justice Marshall's rejection of retributivism was an intent to defuse another argument, which calls itself retributivist (but is in fact utilitarian), and which plays havoc with attempts to limit punishment. This argument proceeds along the following lines: It is human nature to desire revenge against criminals. If the government does not punish criminals to the extent necessary to satisfy this desire, then people will take it upon themselves to get revenge, and social disorder will result.²⁵⁰ I will refer to this argument as "revenge-utilitarianism." The reason that it plays havoc with attempts to limit punishment is that judges will be tempted to conclude that the amount of punishment needed to serve this utilitarian revenge purpose is exactly the amount the legislature has specified.²⁵¹ The amount of punishment needed for utilitarian revenge is, however, the same type of question as the amount of punishment needed for utilitarian deterrence. If in the present state of human knowledge there is not enough evidence to decide these questions one way or the other, then both should turn on who has the burden of persuasion. The appropriate allocation of that burden depends on an application of the risk of error principle developed above.²⁵² A view that holds that courts are incapable of reviewing legislative decisions on revenge-utilitarianism is untenable. On the other hand, when Justice Marshall said that "it simply defies belief to suggest that the death penalty is necessary to prevent the American people from taking the law into their own

²⁵⁰ See, e.g., *Furman v. Georgia*, 408 U.S. at 308 (Stewart, J., concurring); note 79 *supra*.

²⁵¹ For example, Justice White, dissenting in *Roberts v. Louisiana*, responded to the argument that the death penalty does not serve legitimate penological goals more effectively than life imprisonment by stating that "the widespread reenactment of the death penalty . . . answers any claims that life imprisonment is adequate punishment to satisfy the need for reprobation or retribution." 428 U.S. at 354 (White, J., dissenting).

²⁵² See text accompanying notes 121-59 *supra*.

hands,"²⁵³ what he must have meant is that the burden of persuasion on such a claim should be on the government.

Moreover, in order to evaluate both deterrence and revenge-utilitarianism arguments, it is the net social utility produced that must be calculated. The proper way to calculate net social utility is to subtract from the social gain produced by a punishment any social harm attributable to it. When reviewing utilitarian rationales the Court has not fully perceived this. It seemed difficult enough to persuade the Court that the real issue with regard to deterrence was not whether the death penalty deterred at all, but rather whether it deterred more than life imprisonment.²⁵⁴ Some

²⁵³ *Gregg v. Georgia*, 428 U.S. at 238 (Marshall, J., dissenting); see *Furman v. Georgia*, 408 U.S. at 303 (Brennan, J., concurring) ("there is no evidence whatever that utilization of imprisonment rather than death encourages private blood feuds and other disorders").

²⁵⁴ See *Furman v. Georgia*, 408 U.S. at 303 (Brennan, J., concurring); *id.* 346-47 (Marshall, J., concurring). Justice Marshall canvassed the statistical evidence in *Furman* and concluded that it demonstrated that capital punishment "serves no purpose that life imprisonment could not serve equally well." *Id.* 359. In *Roberts*, Justice White surveyed the statistical evidence and found it inconclusive: "It is quite apparent that the relative efficacy of capital punishment and life imprisonment to deter others from crime remains a matter about which reasonable men and reasonable legislators may easily differ." 428 U.S. at 355 (White, J., dissenting). Assuming that the burden of proof on the deterrence issue was on the plaintiffs, White concluded that it would be constitutionally permissible for a legislature to decide that execution *does* in fact deter better than life imprisonment. In his *Gregg* dissent, Justice Marshall disputed the validity of White's conclusion and assessed the scientific flaws of a study published by Isaac Ehrlich, who had claimed to demonstrate that execution is a statistically superior deterrent. 428 U.S. at 234 n.4 (Marshall, J., dissenting) (discussing Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975)).

The Ehrlich article has provoked a flurry of commentary. See Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975); Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975); Ehrlich, *Rejoinder*, 85 YALE L.J. 368 (1976); Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359 (1976). An earlier study by Thorsten Sellin had concluded that capital punishment has no significant deterrent effect. T. SELLIN, *THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE* (1959). See CAPITAL PUNISHMENT IN THE UNITED STATES (H. Bedau & C. Pierce eds. 1976); THE DEATH PENALTY IN AMERICA (H. Bedau ed. 1964). A recent work tending to indicate that execution is not a superior deterrent is Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's*, 61 MINN. L. REV. 743 (1977). See also Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 SUP. CT. REV. 317.

There are those who would press a "common-sense" argument that execution "must" be a better deterrent than life imprisonment, whether or not it can be proved with hard evidence, because people are deterred more by what they fear more, and most people fear death most of all. "No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them." REPORT OF ROYAL COMMISSION ON

of the Court's members have alluded to the possible social harm attributable to the death penalty—encouragement of violence in general, "brutalization" of society, encouragement of deranged people to commit murder as a bizarre form of suicide at the state's hands²⁵⁵—but none seems to have recognized that the measure of these social harms must be subtracted from the revenge-utilitarianism and deterrence benefits, if any, attributable to the death penalty in order to justify it on utilitarian grounds.

It is important to recall that even if a punishment can be justified on utilitarian grounds, that does not end the inquiry under the mixed approach adopted by the Court in *Coker*. A punishment cruel to individuals under the dignity standard cannot be inflicted even if it appears that it would create net social benefits.²⁵⁶

In summary, a two-part test for determining whether or not a punishment is excessive, and therefore impermissibly cruel, emerged from the plurality's opinion in *Coker*, and is implicit, as well, in the opinions of Justice Marshall. First, a punishment is excessive and unconstitutional if it inflicts suffering to which no net social gain is attributable. Second, even if a net social gain can be attributed to a punishment, it is still excessive if it inflicts more pain than the individual deserves, that is, if the punishment is disproportionate to the crime. Following the rationale of the mixed approach, the first standard demands that a punishment be justifiable in the collective mode; the second demands that it also be justifiable in the individualist mode.

CAPITAL PUNISHMENT, 1949-1953, ¶ 57 at 19 (Cmd. 8932) (1953) (quoting statement of Sir James Stephen in 1864), quoted in *Furman v. Georgia*, 408 U.S. at 347 (Marshall, J., concurring). This "common-sense" argument makes two false assumptions: that murderers are rational calculators, and that death for murder would be certain. One commentator has suggested that the reason why people cling to the notion that death "must" be a superior deterrent is that they do not want to admit their retributivism. See Polsby *supra* note 33, at 39-40.

²⁵⁵ See, e.g., *Furman v. Georgia*, 408 U.S. at 351 n.113 & 368 (Marshall, J., concurring); *id.* 303 (Brennan, J., concurring). For an attempt to analyze and document forms of social harm attributable to the existence of the death penalty see Solomon, *Capital Punishment as Suicide and as Murder*, 45 AM. J. ORTHOPSYCH. 701 (1975); West, *Psychiatric Reflections on the Death Penalty*, 45 AM. J. ORTHOPSYCH. 689 (1975).

²⁵⁶ See text accompanying notes 246-48 *supra*. Using Dworkin's formulation, if an individual has a right, it means the government cannot act in contravention of the interest it protects even if that contravention would result in an overall "social gain." See note 185 *supra*. Alternatively, one could arrive at the same position through utilitarian reasoning by assigning very high "utils" in favor of honoring the "right," overwhelming any "social gain" attributable to acts contravening the "right." A utilitarian would make such an assignment of "utils" if she reasoned that the "right" was essential to the long-run maximizing of social good in the system.

E. *Positive and Normative Approaches to Proportionality*

This section addresses the question, earlier postponed,²⁵⁷ of how a court should determine how much punishment a person deserves in response to a given crime. Hence, it focuses on the second part of the *Coker* test. There are two perspectives from which proportionality determinations are traditionally made. The first perspective focuses on the crime and asks such general questions as, "Can commission of rape ever render a person deserving of death?" and such specific questions as, "Can commission of rape render a person deserving of death if no additional acts of violence were suffered by the victim?" The second perspective focuses on the criminal and asks such necessarily specific questions as, "Does a person with a history of social deprivation and oppression deserve death for rape?" The specific questions are generally left to the discretion of judges and juries within a range authorized by the legislature, and the Court has constitutionalized consideration of the specific questions whenever the death penalty is to be imposed.²⁵⁸ This section focuses on the general questions, involving the proportionality check on the legislature. Assuming, for example, that the death penalty is not per se unconstitutional, is it permissible for a legislature to decide that an individual may deserve death for committing rape?

1. The Positive Approach

H.L.A. Hart has said that the notion of proportionality requires correlating penalties with a "commonsense scale of gravity" of offenses.²⁵⁹ This commonsense scale reflects "very broad judgments both of relative moral iniquity and harmfulness of different types of offence."²⁶⁰ There are several possible methods of trying to discover whether the gravity of a given punishment correlates properly with the gravity of a given crime on this scale. There are those who have argued that one way to determine whether death is

²⁵⁷ See text accompanying notes 245-46 *supra*.

²⁵⁸ See text accompanying notes 39-47 *supra*.

²⁵⁹ H.L.A. HART, *supra* note 18, at 25.

²⁶⁰ *Id.* Hart argued that the proportionality requirement inherent in the necessity of adhering to this commonsense scale of gravity is analytically separate both from proportionality in a utilitarian sense (by which he meant a requirement that the social harm caused by the punishment must not outweigh the gain derived from it) and from proportionality in a retributivist sense (by which he meant a requirement that the punishment "fit" the iniquity of the crime). He argued that the requirement of adherence to the commonsense scale in assessing penalties rests instead on the fact that divergence from it risks "either confusing common morality or flouting it and bringing the law into contempt." *Id.*

a fitting punishment for rape, or two years imprisonment is a fitting punishment for assault, is to use legislative enactments as a criterion. This positive approach was one method used by Justice White in *Coker*, who concluded that legislatures had found death to be a disproportionate punishment for rape. He pointed out that although sixteen states had included rape as a capital offense prior to *Furman*, only three retained the death penalty for rape when they revised their sentencing statutes to conform to *Furman*. In response to the argument that eleven of these sixteen states responded to *Furman* with arguably mandatory death sentence statutes, and may have chosen to eliminate rape as a capital crime rather than execute each and every convicted rapist, Justice White noted that six of the eleven had again revised their statutes since *Woodson* and *Roberts* to provide a non-mandatory death penalty that did not include rape as a capital crime, and that four of the five states which responded to *Furman* with guided-discretion death sentence statutes did not re-enact the death penalty for rape.²⁶¹

This positive approach to proportionality is vulnerable to the same criticism earlier set forth with respect to the substantive meaning of the clause generally—that is, insofar as its results are treated as conclusive, it is circular.²⁶² Such criticism, however, may be less severe in a case in which the positive evidence (in *Coker*, the acts of other legislatures) is invoked to demonstrate that a punishment is now considered cruel (excessive) rather than to show that it is not. Although one cannot be certain whether the punishment was abandoned by some legislatures because of its cruelty or for some other reason, use of the risk of error analysis outlined above²⁶³ may indicate that it is preferable to assume they thought it cruel. In terms of protecting individuals, which is the purpose of the clause, it is less risky—though perhaps still unfair to the state—to let the decisions of other state legislatures constitute conclusive evidence of what is cruel than to let them constitute conclusive evidence of what is not cruel.

Another positive approach to the problem, though an oblique one, is through the notion of equal treatment alluded to earlier.²⁶⁴ There are two alternative prongs of this approach; the first lists crimes of similar severity and determines whether their punishments vary significantly, while the second lists crimes subject to

²⁶¹ 433 U.S. at 594-95.

²⁶² See text accompanying notes 184-92 *supra*.

²⁶³ See text accompanying notes 121-59 *supra*.

²⁶⁴ See note 101 *supra*.

similar punishments and determines whether the severity of those crimes varies significantly. If rape is considered about as serious a crime as, say, kidnapping or armed robbery, then if the jurisdiction in question finds lesser punishments sufficient for kidnapping or armed robbery, it is punishing rapists disproportionately. If robbery and kidnapping are considered more serious crimes than shoplifting, then if the jurisdiction in question authorizes ten years in prison for all of them, it is punishing shoplifters disproportionately.²⁶⁵ Of course, in using this method, the severity of crimes must be gauged by some indicator other than the punishments imposed. Justice White in *Coker* could not make a systematic use of the first prong of this comparative approach in overturning execution for rape, because Georgia also authorized execution for armed robbery and kidnapping. Nonetheless, he did compare Georgia's treatment of rape and murder, noting that even deliberate killing would not be punishable by death under the Georgia statute absent aggravating circumstances: "It is difficult to accept the notion, and we do not, that the rape, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim."²⁶⁶ Justice White, by implication, relied, as well, on the second prong of the comparative approach. Georgia authorized execution for both rape and aggravated murder, and his opinion made it clear that he considered aggravated murder (or any murder) a worse crime than rape.²⁶⁷ State courts have used both this intra-jurisdictional comparative approach and the inter-jurisdictional comparative approach previously discussed (looking at how other states have treated the same crime) to analyze proportionality under state analogues to the cruel and unusual punishments clause.²⁶⁸

Neither the intra-jurisdictional nor the inter-jurisdictional approach exhausts the inquiry. It is possible to imagine a hypo-

²⁶⁵ The approach suggested by the second prong is inappropriate when the crimes listed are all subject to the maximum possible punishment. Assume that the maximum punishment a jurisdiction authorizes for any crime is life imprisonment, and that both rape and murder are punishable by life imprisonment. Even if murder is considered a worse crime than rape, it does not follow that rapists are being punished disproportionately. That is, there could be a category of crimes whose severity varied, all of which were determined to warrant the most severe permissible punishment.

²⁶⁶ 433 U.S. at 600.

²⁶⁷ *Id.* White's use of the second prong, however, may in this case have been logically invalid. See note 265 *supra*.

²⁶⁸ See, e.g., *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (possible life imprisonment for recidivist exhibitionism); *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972) (minimum twenty years imprisonment for sale of marijuana).

thetical jurisdiction in which the legislature has decreed "too much" punishment for its least serious crime and punishes all other crimes in proportion to that standard. The intra-jurisdictional approach might foreclose the obvious conclusion that all the authorized punishments were disproportionate to the crimes involved. Similarly, this phenomenon could be repeated in many jurisdictions, diminishing the utility of the inter-jurisdictional approach.

2. The Normative Approach

Ultimately, proportionality comes down to a comparison of the personal and social interests invaded by the criminal with the personal and social interests invaded by the punishment. This is the normative retributivist issue of whether the punishment "fits" the crime. Justice White and the plurality who struck down the death penalty for rape acknowledged this when they discussed the very strong personal interests that are violated when a person is raped, and concluded that they were not as strong as the personal interest in life itself.²⁶⁹ This line of reasoning does not imply that the death penalty is proportionate only for murder and that for any murder it is proportionate; it does not require an overruling of *Gregg* and its companions which struck down mandatory death penalties for murder. If that were all that now is meant by proportionality it could be reduced to "an eye for an eye." Chief Justice Burger, dissenting in *Coker*, correctly pointed out that the matter is not so simple as that, though he would argue, as I do not, that sometimes "more than an eye" is appropriate "for an eye."²⁷⁰ A civilized society would not decree that the proper punishment for rapists is that they be raped.

The dignity basis of retributivism provides a normative approach to the proportionality issue. Serious crimes like rape and murder are severe invasions of the dignity interests of other persons. The criminal completely fails to treat the victim as a person, worthy of concern and respect. That is no doubt the reason why such acts are considered serious crimes and why the victim is justified in fighting back, even to the point of taking life where life is threatened. Nevertheless, if the government is prohibited by the cruel and unusual punishments clause from violating the dignity interest,

²⁶⁹ 433 U.S. at 598.

²⁷⁰ The Chief Justice justified that position by noting the possibility of increased deterrence. He stated: "It is after all not irrational—nor constitutionally impermissible—for a legislature to make the penalty more severe than the criminal act it punishes in the hope it would deter wrongdoing . . ." *Id.* 619 (Burger, C.J., dissenting) (footnote omitted).

then it cannot treat criminals the way criminals treat victims, or even (necessarily) the way victims have a right to treat criminals.

Why ought the government's power to punish be so limited by the dignity interest? First, a utilitarian argument might be advanced that for the government to adopt as a practice that which we condemn as an isolated individual's act would be counterproductive in the long run, at least if one objective of government is to preserve and foster respect for individual personal interests among citizens. Second, a rights argument might be advanced which would focus on the risk of error or arbitrariness notion. Practices arguably violating human dignity could not be administered without some error or arbitrariness, and the seriousness of the risk of harm to individuals because of the errors (that is, the importance of the threatened personal interests) is one idea underlying the notion of constitutionally protected individual rights against the government.²⁷¹ Citizens can be supposed (using the social contract metaphor) to have yielded to the government certain powers for the purpose of promoting the collective harmony and welfare; but because of the danger to individual interests if that power is made absolute, certain limitations respecting individuals are placed upon the government, even if that results, in some cases, in the achievement of less social "good."²⁷² One of those limitations is a right against being cruelly punished. It is not appropriate to ask whether the criminal was cruel to her victim, and then to respect the right only when the criminal was not. More generally, it is not proper to say that a punishment that invades the personal interests of the criminal no more severely than the criminal invaded the personal interests of the victim is ipso facto permissible, for the punishment may invade the criminal's dignity interest to such an extent as to be cruel, regardless of her actions. At the same time, it may be proper to say that a punishment that invades the personal interests of the criminal *more* severely than the criminal invaded the personal interests of the victim must be considered disproportionate, and thus impermissible under the dignity standard, even if that type of governmental invasion does not violate human dignity when considered in the abstract (as the Supreme Court has held the death penalty does not). The result of this line of reasoning is that the government may adopt *lex talionis* only to the extent that the dignity standard is not thereby violated. A punishment can be *invalidated* if the personal interest it invades is "disproportionate"

²⁷¹ See text accompanying notes 126-29 *supra*.

²⁷² See note 256 *supra*.

to the interest invaded by the criminal; however, because of the dignity standard, a punishment cannot be *validated* merely because the interest it invades is "proportionate" to the interest invaded by the criminal.

V. CONCLUSION: FURTHER REFLECTIONS ON THE DEATH PENALTY

Coker v. Georgia will not be the last word of the Supreme Court on the constitutionality of the death penalty.²⁷³ In conclusion, I shall consider briefly how the analysis developed in this Article further bears on the acceptability of execution as punishment.

The irrevocability and enormity of the death penalty, as well as the individual defendant's fundamental interest in life require that the risk of error principle be used to resolve moral uncertainty about the substantive meaning of the cruel and unusual punishments clause against the state. In more traditional terms, something approaching compelling state interest/least restrictive alternative analysis is the proper level of scrutiny. In addition, the burden of persuasion on the issue of the existence of a moral consensus supporting the death penalty must fall on the state.

With regard to the clause's substantive meaning application of the two part excessiveness test of *Coker* to the death penalty leads to the following conclusions. Under the first excessiveness standard of *Coker*, associated with utilitarian justifications for punishment, a punishment is excessive and therefore cruel if it makes no "measurable contribution" to "acceptable goals of punishment." Applying this standard one is tempted to agree with Justice Marshall that "there is no rational basis for concluding that the death penalty is not excessive,"²⁷⁴ because no one has shown that it results in any "measurable" net social gain.²⁷⁵ Instead of evidence there has been

²⁷³ On January 17, 1978, the Supreme Court heard arguments on two cases challenging the Ohio death penalty statute on a variety of procedural and substantive grounds. In *Bell v. Ohio*, 48 Ohio St. 2d 270, 358 N.E.2d 556 (1976), *cert. granted*, 45 U.S.L.W. 3840 (U.S. June 27, 1976) (No. 76-6513), the plaintiffs challenged the procedures under the statutory scheme for consideration of mitigating and aggravating circumstances and burdens of proof concerning those circumstances. See 46 U.S.L.W. 3008 (U.S. July 5, 1977). In *Lockett v. Ohio*, 49 Ohio St. 2d 48 (1977), *cert. granted*, 46 U.S.L.W. 3238 (U.S. Oct. 11, 1977) (No. 76-6997), the plaintiffs challenged limitations on the consideration of mitigating circumstances, the disproportionality of the death penalty for one who aids and abets the commission of a murder by reason of participation in a conspiracy to accomplish armed robbery, the burden of proof on mitigating circumstances and the exclusion for cause of jurors with conscientious scruples against capital punishment. See 46 U.S.L.W. 3269-70 (U.S. Oct. 18, 1977).

²⁷⁴ *Furman v. Georgia*, 408 U.S. at 359 (Marshall, J., concurring).

²⁷⁵ See note 254 *supra*.

a presumption, not easily rebuttable, that it does,²⁷⁶ a presumption that I have argued is impermissible in view of the nature of the fundamental personal right at stake.²⁷⁷ States that do not have the death penalty have, as far as anyone can tell, experienced neither higher murder rates nor increased social disorder from private vengeance.²⁷⁸ This would tend to indicate, at a minimum, that the death penalty is not the least restrictive means for furthering the goals of deterrence and revenge-utilitarianism, assuming that both of these goals of punishment are permissible. Anything that is not the least restrictive means of doing something is excessive, unless a different meaning for the word "excessive" can be justified.²⁷⁹ If courts do not know and cannot tell whether something is the least restrictive means, however, who wins? The answer should depend on which decision would cause more social harm if erroneous. The kind of social harm that now results if the death penalty is not the least restrictive means is obvious. The social harm that would result if the death penalty were the least restrictive means to permissible ends and were disallowed, is speculative. Utilitarian analysis alone seems to require that the death penalty be abandoned, at least long enough to see whether any net social harm would result.

Moreover, regardless of utilitarian considerations, the dignity standard relied upon by Justice Brennan and implied in the second prong of the *Coker* test may now disallow execution. What is the current moral consensus on whether or not execution of a person violates that person's dignity so as to be unconstitutionally cruel? Murder is the ultimate lack of respect for another person; it is not possible to compare its penalties to the law's treatment of like cases. It is possible to conclude that moral positions consistent with many of our most deeply held values could be formulated both for and against execution for murder. The death penalty has been the subject of serious moral debate for more than a century. Though my own position of reflective equilibrium is like Justice Brennan's, I cannot demonstrate that it is "the" deep position and that current standards of decency, properly characterized, now foreclose execution.

This Article has argued, however, that our system does have settled principles that tell us on which side we ought to risk error when an issue is the subject of such moral debate. There is a basic

²⁷⁶ I am referring here to the "common-sense" argument that death is worst, so it must deter most. See note 254 *supra*.

²⁷⁷ See text accompanying notes 121-59 *supra*.

²⁷⁸ See note 254 *supra*.

²⁷⁹ See text accompanying note 225 *supra*.

consensus on the principles of adjudication in the face of uncertainty. They are not merely principles for deciding the standard of review a court should adopt in a given case; they are moral principles in themselves. If we as a society are seriously divided on whether a fundamental individual interest may be invaded by the government under certain circumstances, it is morally wrong to behave as if there existed a moral consensus that justified invading that interest.²⁸⁰

Furthermore, even if it might be permissible for the government sometimes to invade such a fundamental individual interest under circumstances where we as a people are a house divided, it might be so only under a system that could infallibly determine which individuals deserve the deprivation in question. If infallibility is to be required for any case, it should be required where the deprivation is irrevocable; and if infallibility is to be required in any case in which the deprivation is irrevocable, it should be required where the irrevocable deprivation is of life itself. We may be a house divided on the abstract question whether execution of an occasional citizen for murder violates the respect due to persons. But when considered in the light of the fallible procedures that are available to identify which persons are to be killed, we must conclude that it does.

²⁸⁰ In *Roe v. Wade*, 410 U.S. 113 (1973), the Court noted the lack of consensus as to "the difficult question of when life begins," *id.* 159, and concluded: "In view of all this [controversy] we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." *Id.* 162. Thus, the *Roe* Court recognized that in a conflict between fundamental rights of individuals and the interests of the state, questions of the validity of a moral theory concerning which there exists no consensus, should be resolved against the state. The opposing deferential approach which I have argued against in this Article is exemplified by Chief Justice Burger's *Coker* dissent. The Chief Justice argued that the government ought to be allowed to "experiment" with the death penalty "to prevent and deter" various crimes. 433 U.S. at 621 (Burger, C.J., dissenting).